13 WENTWORTH SELBORNE CHAMBERS

CONTINUING LEGAL EDUCATION SERIES
21 November 2006

OFFERS OF COMPROMISE

1. Offers of Compromise have existed under the *District Court Rules* and *Supreme Court Rules* for some years. However the Offer of Compromise procedure changed in some fairly significant respects with the introduction of the *Uniform Civil Procedure Rules*. Division 4 of Part 20 of the *Uniform Civil Procedure Rules* took effect on 15 August 2005. Set out below is a brief summary of some of the important features of the Offer of Compromise procedure, with particular attention being given to new features.

2. First, there is a formal requirement under r20.26(3)(a) that the Offer of Compromise **must** bear a statement to the effect that the offer is made in accordance with "these rules".

3. This requirement is important, because the *Uniform Civil Procedure Rules* do not otherwise require that an Offer of Compromise be prepared in a particular Court format document. Thus, there is no reason why a letter which states that it is made in accordance with Division 4 of Part 20 and otherwise complies with the *Uniform Civil Procedure Rules* cannot be a valid Offer of Compromise.

4. Second, and very importantly, pursuant to r20.26(2), an Offer of Compromise "**must be exclusive of costs**" except in the case of an offer of a verdict for the defendant with each party to bear their own costs. It has been held that r20.26(2) requires that "the amount of the offer must be exclusive and not in any way inclusive of costs"; *Mid-City Skin Cancer and Laser Centre Pty Ltd v. Zahedi-Anarak & Ors* [2006] NSWSC 684. It is noteworthy that the Offer of Compromise provisions of the former *Supreme Court Rules* and the *District Court Rules* did not contain a similar provision to r20.26(2). However, it has been a well established convention in the Supreme and District Courts for some years that Offers of Compromise were expressed to be "plus costs as agreed or assessed". The decision of Justice MacDougall in *Mid-City Skin Cancer and Laser Centre* is to the effect that an Offer of Compromise expressed to be made for $X "plus costs as agreed or assessed" will be valid, despite not being in precisely the form envisaged by r20.26(2).

5. The important point to remember in relation to r20.26(2) is that an Offer of Compromise must not be expressed to be in any way inclusive of costs, except in the case of an offer by a defendant of a verdict for the defendant. Obviously, an offer by a plaintiff or defendant of $100,000 inclusive of costs would not comply with r20.26(2) and it would therefore not be taken into consideration as regards costs. Further and perhaps less obviously, if a plaintiff were to offer to settle a claim for $100,000, plus costs in the amount of $50,000, my view is that such an offer would offend r20.26(2) and therefore would not be taken into account in relation to costs, even if the plaintiff obtained a judgment for more

than $100,000 and the specified sum for costs was reasonable in the circumstances. The *Uniform Civil Procedure Rules* do not make specific provision for such an eventuality, (cf the old Part 19A r2A of the *District Court Rules*), but in my view, the plain words of r20.26(2) should be read to prohibit the making of a principal offer and a further offer as to costs.

6. Similarly, if a defendant were to serve an Offer of Compromise in the amount of $50,000, "plus costs in the sum of $50,000", it would also, in my view, offend r20.26(2) and therefore not be taken into account in relation to costs, no matter how generous the costs offer happened to be.

7. Prior to the introduction of Division 4 of Part 20, it was well established that an Offer of Compromise which specified an offer of a verdict for the defendant which each party to pay their own costs was capable of being a genuine Offer of Compromise and thus attracting the cost sanctions of the Offer of Compromise regime; *Leichhardt Municipal Council v. Green* [2004] NSWCA 341, at 39. To the extent that there was any remaining uncertainty regarding the status of such offers, it has now been removed by r20.26(2), which specifically recognises an offer of a verdict for the defendant with each party to bear their own costs.

8. Third, r20.26(7) specifies the period of time that an Offer of Compromise **must** be left open for. In short, it provides that in the case of an Offer of Compromise made two months or more before the date set down for the commencement of the trial, the offer must be left open for a minimum of 28 days and in the case of an Offer of Compromise made less than two months before the date set down

for the commencement of the trial, the offer must be left open for such time "as is reasonable in the circumstances".

9. Rule 20.26(7) represents a substantial change in the law, in the way that it permits Offers of Compromise to be left open for relatively short periods of time, depending upon the circumstances of each case. The sort of circumstances which are likely to be relevant to the determination of what constitutes a "reasonable time" include the state of pre trial preparation, the compliance or non compliance of particular parties with directions regarding the preparation of the matter for hearing, the progress of interlocutory steps which have been taken to prepare the matter for hearing and any other information known to the parties regarding the readiness of the matter for trial. It has been held that a late Offer of Compromise which is only left open for a few days will not necessarily be an offer which was not open for a "reasonable time"; *Leda v. Weerden* (No. 3) [2006] NSWSC 220.

10. Fourth, pursuant to rules 20.25 and 20.27, if a time for acceptance is specified in an Offer of Compromise, then it is open until that time, but if no time is specified, it will remain open for 28 days from the date upon which the offer was made. Further, Division 4 of Part 20 has introduced the concept of a "final deadline" so that if an Offer of Compromise has not expired, (because the time specified for acceptance has not yet passed or in the case where no time is specified, 28 days have not yet passed since the Offer of Compromise was made), then it will expire:

(i) in the case of a jury trial – at the time at which the judicial officer begins to sum up to the jury; or

(ii) in the case of a matter referred for arbitration – at the conclusion of the arbitration hearing; or

(iii) in any other case – the time at which the judicial officer begins to give his or her decision or his or her reasons for judgment, whichever is the earlier, on a judgment (except an interlocutory judgment).

11. As a practical matter and to avoid any uncertainty, it is advisable to specify a period for acceptance in an Offer of Compromise. Whilst *Mid-City Skin Cancer and Laser Centre* was ultimately resolved in the favour of the defendants, the dispute could have been avoided had the original Offer of Compromise specified a period of acceptance of 28 days.

12. Fifth, r20.26(4) places a prohibition on a plaintiff making an Offer of Compromise until such time as the defendant has been given "such particulars of the plaintiff's claim, and copies or originals of such documents available to the plaintiff, as are necessary to enable the defendant to fully consider the offer". However, r20.26(5) makes it clear that if the defendant wants to assert that an Offer of Compromise made by the plaintiff offends r20.26(4) and therefore should not be taken into account for purposes of costs, it is incumbent upon the defendant to raise the matter in writing within 14 days after receiving the Offer of Compromise.

13. Sixth, an Offer of Compromise cannot be withdrawn during the period of acceptance for the offer unless the Court otherwise orders. The authorities suggests that it will ordinarily be necessary to establish some proper reason for seeking to withdraw an Offer of Compromise, such as the offer having been made as the result of a genuine mistake or a recent significant change in the complexion of the case, perhaps due to the service of new evidence or a recent judicial decision.

14. Seventh, Division 3 of Part 42 sets out the particular cost consequences which are to follow the acceptance or non acceptance of an Offer of Compromise. Rule 42.13A provides that where an Offer of Compromise is made by a plaintiff and accepted by a defendant or made by a defendant and accepted by a plaintiff, the plaintiff will ordinarily be entitled to an order against the defendant for the plaintiff's costs in respect of the claim, assessed on the ordinary basis, up to the time "**when the offer was made**", unless, the offer is stated to be a verdict for the defendant with each party to bear their own costs or, the Court orders otherwise.

15. The position prior to the introduction of the *Uniform Civil Procedure Rules* was that where a plaintiff accepted an Offer of Compromise, he or she was entitled to costs up to the date of acceptance. That has now changed, so that the plaintiff in the same situation is only entitled to costs up to the date the offer was made, absent an otherwise order. That difference can be of some significance in the couple of months leading up to a hearing.

16. Rule 42.14 provides that where a plaintiff equals or beats an Offer of Compromise, (which has not been accepted by a defendant), the ordinary position is that the plaintiff will be entitled to:

    (i) Costs on an ordinary basis up to the day after the Offer of Compromise was made; and

    (ii) Costs on an indemnity basis thereafter.

17. On the other hand, r42.15 provides that where a defendant equals or beats an Offer of Compromise, (which has not been accepted by a plaintiff), the ordinary position will be as follows:

    (i) The plaintiff will be entitled to costs on an ordinary basis up until the day following the day on which the Offer of Compromise was made; and

    (ii) The defendant will be entitled to costs on an indemnity basis thereafter.

18. It needs to be emphasised that both under r42.14 and r42.15, the Court has the discretionary power to make an "otherwise order" in appropriate circumstances.

19. Because of the costs consequences which can follow the failure to accept an Offer of Compromise, both plaintiffs and defendants have very real reasons to properly consider any reasonable Offer of Compromise which is served upon them. Indeed, the pressure on a plaintiff to very carefully consider any reasonable Offer of Compromise made by a defendant has increased under r42.15, in that the ordinary position where a defendant equals or beats an Offer of Compromise is now that the plaintiff will pay the defendant's costs on an

indemnity basis from the day after the day on which the offer was made. Previously, the position under Part 52A r22(6) of the *Supreme Court Rules* and Part 39A r25(6) of the *District Court Rules* was that where a defendant equalled or beat an Offer of Compromise, then "unless the Court in an exceptional case and for the avoidance of substantial injustice otherwise orders", the plaintiff was entitled to costs up until the day the offer was made on an ordinary basis and the defendant was entitled to costs on a party/party basis thereafter. As decisions like *Leichhardt Municipal Council v. Green* demonstrate, it was difficult for a defendant to prove an entitlement to indemnity costs under the previous regime, *Leichhardt Municipal Council v. Green* [2004] NSWCA 341, at [52]-[58].

20. For an example of a recent decision in which the Court ordered that defendants who beat their Offer of Compromise receive indemnity costs from the day after the service of an Offer of Compromise, see *Mid City Skin Cancer and Laser Centre v. Zahedi-Anarak & Ors* [2006] NSWSC 1149.

21. Plaintiffs in smaller personal injury claims also need to give careful consideration to making early and realistic Offers of Compromise, noting the combined effect of ss338 and 340 of the *Legal Profession Act*. In short, a well calculated Offer of Compromise is virtually the only means by which a plaintiff can avoid the costs cap contained in s338 in a personal injury claim in which damages of less than $100,000 are recovered.

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21 NOVEMBER 2006

CASE NOTE ON *MID-CITY SKIN CANCER AND LASER CENTRE PTY LTD V ZAHEDI-ANARAK & ORS* [2006] NSWSC 684

THE OFFER OF COMPROMISE REGIME UNDER THE *UNIFORM CIVIL PROCEDURE RULES* 2005

Division 4 of Part 20 of the *Uniform Civil Procedure Rules*, which commenced operation on 15 August 2005, introduced some fairly significant changes to the Offer of Compromise procedure which had previously applied in the NSW courts. In this decision, which it must be noted involved claims for urgent declaratory relief, Justice McDougall considered the new Offer of Compromise provisions, particularly Rules 20.25, 20.26 and 20.27.

The background of the proceedings was that the plaintiff's substantive claim, which was for breach of confidence and passing off/breach of Section 52 of the *Trade Practices Act*, was part-heard before Justice Campbell. On 10 May 2006, before the substantive hearing began, the defendants jointly sent a letter to the plaintiff, serving an Offer of Compromise said to be made under the Rules, which offered "$10,000 plus costs as agreed or assessed, in full satisfaction of any claim the plaintiff may have against the defendants". The substantive hearing then began before Justice Campbell on 13 June 2006 and on 16 June 2006, it was adjourned part-heard. On 21 June 2006, the plaintiff's solicitor wrote to the defendants' solicitors, purporting to accept the earlier Offer of Compromise.

The plaintiff's principal argument was that because the Offer of Compromise used the words "plus costs as agreed or assessed", it offended Rule 20.26(2), which required that an offer must be "exclusive of costs". The plaintiff claimed that because Rule 20.26(2) had been offended, the Offer of Compromise in effect converted to an ordinary contractual offer and that consequently, there was no implied time limit of 28 days for acceptance, as would otherwise have been the case having regard to the combined effect of Rule 20.25 and Rule 20.27.

Justice McDougall rejected the plaintiff's argument, stating that Rule 20.26(2) requires that "the amount of the offer must be exclusive and not in any way inclusive, of costs". His Honour accepted that whilst it was not necessary for the offer to refer to costs, the words used in the offer "made it clear that the offer did not include or was not to be taken to include, costs". His Honour also rejected the contention that the use of the unnecessary extra words "plus costs as agreed or assessed" somehow converted the offer from being an Offer of Compromise into a general contractual offer.

Justice McDougall's decision sounds a note of caution regarding the language to be used in Offers of Compromise. Whilst his Honour ultimately rejected the plaintiff's various arguments, there is a danger in using less than precise language in an Offer of Compromise. It is suggested that to avoid any confusion and to comply as fully as possible with Division 4 of Part 20 of the *Uniform Civil Procedure Rules*, it would be preferable to:-

(i) Specify in the Offer the time limit for acceptance; and

(ii) Specify in the Offer that it is exclusive of costs and made in accordance with Division 4 of Part 20 and Division 3 of Part 42 of the *Uniform Civil Procedure Rules*.

Whilst such language may not make it as immediately obvious what is being offered, (i.e. an amount in respect of the claim and costs up to the date the offer was made), it avoids any suggestion of ambiguity as to the offer being inclusive of costs.