# Offers of compromise under rule 20.26 of the UCPR: Learned Friends, Fiji July 2015

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# Introduction and objectives of this Paper

- Key aspects of making valid and enforceable offers of compromise per rule 20.26 of *Uniform Civil Procedure Rules* 2005 (NSW) ("UCPR").

- Rule 20.26 of UCPR applies to civil proceedings in Local Court (General Division), District Court, Supreme Court , classes 1 - 4 proceedings in Land and Environment Court, Industrial Relations Commission and Dust Diseases Tribunal.

- Primary objective: understand the operative components of a valid offer of compromise.

- Secondary objectives: Clarify the main differences between offer of compromise under UCPR and offer per *Calderbank v Calderbank* [1975] 3 WLR 586 ("*Calderbank*") and review three decisions of Supreme Court regarding offers made since 7 June 2013.

# Importance of an effective offer of compromise – costs orders are here to stay (usually)

- Case management principles of sections 56-60 of *Civil Procedure Act 2005* (NSW) make rule 20.26 of UCPR essential for civil litigators.
- Rule 20.26 of UCPR is designed to encourage early settlement by service of offers of compromise and the threat of costs penalties that apply under Division 3, Part 42 of UCPR.
- Costs orders are invariably final as costs orders can only be appealed from with leave.
- Non compliance with rules prevents parties from obtaining benefit of indemnity costs order.

# Division 4, Part 20 of the UCPR- making and enforcing an offer of compromise under rule 20.26 of the UCPR

- Rule 20.26 substantially amended on 7 June 2013 by Amending Order No 59.

- Rule 20.26(3) permits offers to be made that include provisions for costs but on analysis these only permit a defendant to make an offer that includes a provision for costs.

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- Offer must remain open for period of acceptance and be accepted in writing.

- Where an offer is accepted either party may apply for judgment per rule 20.27(3) and if there is a breach the innocent party may apply for a judgment or other orders reflecting the agreement as per rule 20.29

# Controversies involving former rule 20.26 and *Whitney v Dream Developments Pty Ltd*

- Rule 20.26 substantially amended by *Uniform Civil Procedure Rules (Amendment No 59)* 2013 that took effect 7 June 2013.
- Offers of compromise made before 7 June 2013 are subject to previous version of rule 20.26 per Part 1 of Schedule 12 of UCPR.
- Pre 7 June 20013 version of rule 20.26(2) of UCPR said: "An offer must be exclusive of costs, except where it states that it is a verdict for the defendant and that the parties are to bear their own costs."

# Controversies involving former rule 20.26 and *Whitney v Dream Developments Pty Ltd* (cont.)

- Use of the words "must be exclusive of costs" gave rise to a great deal of confusion amongst practitioners and conflicting judgments.

- The confusion was not resolved until judgment of NSW Court of Appeal sitting as 5 judges (including Chief Justice Bathurst) in *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188 (25 June 2013) ("*Whitney*").

- Court of Appeal held that an offer of compromise of payment of a particular sum with words "the defendant to pay the plaintiff's costs as agreed or assessed" invalidated the offer as those words fettered the discretion of court under Division 3, Part 42 of UCPR characterised by the words "Unless the court orders otherwise…".

# Division 4 of Part 42 of UCPR – the costs regime to be applied following an offer of compromise

- Rule 42.13A where an offer is made with no provision as to costs is accepted, costs paid on ordinary basis to date the offer is made.

- Rule 42.14 where offer is made by plaintiff but not accepted and order or judgment is no less favourable to plaintiff, plaintiff entitled to costs on ordinary basis to day after (or 11.00am on day after) offer made and thereafter on indemnity basis.

- Rule 42.15 where an offer is made by defendant but not accepted and order or judgment no more favourable to plaintiff, plaintiff entitled to costs on ordinary basis to date of offer and defendant entitled to indemnity costs from day after offer (or 11.00am on day after).

- 42.15A where offer made by defendant but is not accepted and order or judgment is no less favourable to defendant, defendant entitled to costs on ordinary basis to day after offer (or 11.00am on day after) and thereafter on indemnity basis.

# Application of the amended rule 20.26(3) – offers that include costs can only be made by a defendant only

- Amendment of rule 20.26 from 7 June 2013 does not remove risk of an offer being invalid if it includes a reference to costs.

- Amended rule 20.26(2) and (3) limits a plaintiff to making an offer of compromise that does not include costs and is not expressed to be inclusive of costs. If an offer of compromise made by plaintiff includes costs it may be invalid applying *Whitney*.

- Amended rule 20.26(2) and (3) permit, in effect, a defendant to make an offer of compromise that includes a provision for the payment of costs in certain circumstances.

# Application of the amended rule 20.26(3) – offers that include costs can only be made by a defendant only (cont.)

- The words "verdict in favour of defendant" no longer used in rule 20.26; the relevant words in rule 20.26(3)(a) of UCPR are now "judgment in favour of defendant".

- If an offer of "judgment in favour of the defendant" is made, costs that may be offered are either that there is no order for costs as per rule 20.26(3)(a)(i) or that the defendant will pay a specified sum in respect of the plaintiff's costs as per rule 20.26(3)(a)(ii).

- Rule 20.26(3)(a)(ii) enables an offer of a judgment for the defendant plus a specified sum for costs and is attractive to a plaintiff who has incurred costs. This offers more "bait on the hook" than the former "verdict for the defendant and that the parties are to bear their own costs."

# Application of the amended rule 20.26(3) – offers that include costs can only be made by a defendant only (cont.)

- Valid offers of compromise:

1. Offer made by a plaintiff to defendant for the plaintiff to accept a sum or other orders for settlement with no provision as to costs.
2. Offer made by a defendant to pay a sum or other orders for settlement with no provision as to costs.
3. Offer made by a defendant of a judgment for defendant with no order as to costs.
4. Offer made by a defendant of a judgment for defendant with payment of a specified sum for costs.
5. Offer by defendant to pay a sum or other orders for settlement and that costs as agreed or assessed will be paid by the defendant.
6. Offer to pay a sum or other orders for settlement and that costs as agreed or assessed on ordinary or indemnity basis will be paid from an estate, notional estate or fund.

# What is a compromise and when should a compromise be offered?

- An offer must involve a "real and genuine element of compromise" – *Hearning v GWS Machinery Pty Ltd (No 2)* [2005] NSWCA 375.

- An offer that is merely a demand for payment of the full claim that is "designed to simply trigger the entitlement to indemnity costs" will not be regarded as a compromise and will not justify a costs order: *Tickell v Trifleska Pty Ltd* (1990) 25 NSWLR 353.

- When an offer of compromise should be made is an impressionistic determination. Usually the best time for a plaintiff to make an offer is after sufficient particulars and evidence have been provided to enable an assessment of the claim or defence.

# Invalid offers of compromise and reliance in alternative on *Calderbank*

- Invalid offers may be rescued by reliance on principles of *Calderbank*. The covering letter serving the offer of compromise should refer to *Calderbank* to ensure reliance on that case in the event the offer is invalid under UCPR.

- *Calderbank* offers permit the court to depart from the usual rule that a successful party's costs are to be paid on the ordinary basis.

- The onus is on the offeror to prove that it was unreasonable for the offeree to refuse the offer: *Evans Shire Council v Richardson* [2006] NSWCA 61.

- Issue of "unreasonable" is to be determined by an objective assessment of all circumstances of the case in which the offer was made; the relevant factors include the pleadings, particulars and served evidence as at the date the offer was made.

# Invalid offers of compromise and reliance in the alternative on *Calderbank* (cont.)

- Questions arise under *Calderbank* offers as to whether an offer is a genuine compromise. This issue is to be determined by objective assessment of all circumstances of the case and the nature of the offer.

- Relevant factors in determining whether an offer is a genuine compromise include pleadings, particulars and evidence, such factors to be assessed at the time the offer was made.

- An offer by a defendant of each party walk away and pay their own costs was a genuine compromise in the circumstances: *Leichhardt Municipal Council v Green* [2004] NSWCA 341.

- The test is whether or not the offer has been made in a "genuine attempt to reach a negotiated settlement": *Leichhardt Municipal Council v Green* (*supra*) at [39].

# Three significant cases considering offers of compromise under rule 20.26 made after 7 June 2013

- *AAI Limited v Josipovic (No 2)* [2013] NSWSC 1577 (1 November 2013) per Campbell J.
- Proceedings by insurer for review of CARS assessor's certificate that contained assessment of damages and sum for costs. In effect a complaint about assessment of damages.
- First defendant (injured claimant) made offer of compromise of payment of damages and costs less than claims assessment but did not include orders for setting aside the claims assessor's certificate.
- Able to make offers of compromise in administrative review matters by reduced damages assessment but offer invalid as did not dispose of "the claim" to which it relates per rule 20.26(2)(a)(ii).

# Three significant cases considering offers of compromise under rule 20.26 made after 7 June 2013 (cont.)

- *Owners Corporation Strata Plan No 74667; 74670 and 74662 v Auburn City Council* [2015] NSWSC 86 (17 February 2015) per Rein J.

- Plaintiffs brought claims for defects. Defendants made joint offer dated 22 January 2015 of damages plus payment of costs "as agreed or assessed". Defendants accepted 1 February 2015 subject to approval of owners at general meetings.

- Plaintiff claimed costs should be paid to 1 February 2015; defendant said costs should be paid to 22 January 2015.

- Court: defendant to pay costs to 22 January 2015 as per rule 20.26(3)(b) "up to time the offer was made".

# Three significant cases considering offers of compromise under rule 20.26 made after 7 June 2013 (cont.)

- *Leach v The Nominal Defendant (QBE Insurance (Australia) Ltd (No 2)* [2014] NSWCA 391 per McColl JA (Gleeson JA and Sackville AJA agreeing).
- Offer made of "verdict for respondent" with each party pay their own costs in appeal involving complex issues of liability and large quantum in brain damage case. Appellant submitted it should be characterised as a "capitulation" and it was reasonable not to accept the offer.
- Court refused to make order for indemnity costs and held that to create an entitlement to indemnity costs, an offer amounting to capitulation should be made where a claim or defence "approach something of the character of being frivolous or vexatious".

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