

Insurance Law Case Note

7 July 2010

Smart Distribution Services Pty Limited –v– General Wholesale Pty Limited (No 3) [2010] NSW DC 108

Authors: Victor Kelly, Partner
Tim Holmes, Lawyer

This matter concerns costs in the event that an offer of compromise was rejected and the party who served the offer of compromise goes on to succeed at hearing

In this matter the plaintiff has served an offer of compromise in the following terms:

1. Judgment for the plaintiff against the defendant in the sum of \$150,000 inclusive of interest.
2. The defendant to pay the plaintiff's costs and disbursements as agreed or assessed.
3. This offer is made pursuant to the Uniform Civil Procedure Rules (UCPR) 2005 Part 20 Division 4 Rule 20.26.
4. This offer is open for acceptance for 28 days from the date of this offer of compromise.

The defendant rejected the offer of compromise. The matter proceeded to hearing where judgment was subsequently awarded for the plaintiff against the defendant for \$181,544.88.

In this action the plaintiff sought to have the defendant pay their costs on an ordinary basis up until the date of the offer of compromise and

on an indemnity basis subsequent to the offer of compromise. The plaintiff submitted that since the judgment of the court was now more favourable to the plaintiff than the offer, the plaintiff was entitled to the orders sought for indemnity costs under UCPR Rule 42.14. The defendant opposed the costs order on the grounds that the offer of compromise did not comply with UCPR Rule 20.26(2) as it was not an offer exclusive of costs.

Uniform Civil Procedure Rule 20.26:

20.26 Making an offer

1. In any proceedings, any party may, by notice in writing, make an offer to any other party to compromise any claim in the proceedings, either in whole or in part, on specified terms.
2. 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.
3. A notice of offer:
 - (a) must bear a statement to the effect that the offer is made in accordance with these rules; and
 - (b) if the offeror has made or

been ordered to make an interim payment to the offeree, must state whether one or the other is in addition to the payment so made or ordered.

12. A notice of offer that purports to exclude, modify or restrict the operation of Rule 42.14 or 42.15 is of no effect for the purposes of this division.

The defendants argued that the offer of compromise was not exclusive of costs as in paragraph 2 of the offer there was an offer made in relation to costs

The defendants argued that the offer of compromise was not exclusive of costs as in paragraph 2 of the offer there was an offer made in relation to costs. They submitted that no reference to costs was permissible, because any offer exclusive of costs is subject to Rule 42.13A, which entitles the plaintiff to an order for costs on an ordinary basis up to the time when the offer was made unless the court orders otherwise.

Judge Bozic SC considered *Mid-City Skin Cancer & Laser Centre –v– Zahedi-Anarak & Ors* [2006] NSWSC 684 to be the most appropriate case. In that case the opposing party argued that the

reference to costs, made in a similar manner to the reference in this matter, introduced ambiguity as it was not clear whether the costs referred to were up until the date of the offer (in accordance with UCPR Rule 42.13A(2)) or up until the date of acceptance (in accordance with the common law).

The effect of the judgment in *Mid-City* was that an offer for a specified amount "plus costs agreed or assessed" is an offer exclusive of costs within the meaning of Rule 20.26(2). Judge Bozic SC upheld this judgment and noted that when making an offer of a specified amount, it is unnecessary to specify

as part of the offer that the costs are as agreed or assessed as it mirrors Rule 20.26 and 42.13A.

As the offer of compromise was considered to be exclusive of costs within the meaning of Rule 20.26(2), unless the court ordered otherwise, the plaintiff was entitled to an order against the defendant for the plaintiff's costs assessed on an indemnity basis from the date of the offer.

Judge Bozic SC ordered:

1. The defendant pay the plaintiff's costs of the proceedings up to and including 30 June 2009 on an ordinary basis, as agreed or assessed; and

2. The defendant pay the plaintiff's costs of proceedings from 1 July 2009 on an indemnity basis as agreed or assessed.

The consequences of this case are:

1. Offers of compromise which include a mention of costs to be decided "as agreed or assessed" do not contravene the requirement under Rule 20.26(2) of the UCPR for an offer to be exclusive of costs.
2. Judge Bozic SC opined that as costs would be decided "as agreed or assessed" whether those words were there or not, the words are not necessary.

Contacts

Victor Kelly, Sydney	+61 2 9391 3216	vkelly@hunthunt.com.au
Fiona Hornsby, Sydney	+61 2 9391 3205	fhornsby@hunthunt.com.au
Graeme Armstead, Melbourne	+61 3 8602 9249	garmstead@hunthunt.com.au
Tony Mylne, Brisbane	+61 7 3292 9715	amylne@macrossans.com.au
Peter Jones, Adelaide	+61 8 8414 3330	pjones@hunthunt.com.au
Darren Miller, Perth	+61 8 9488 1300	darren.miller@marksandsands.com.au
Peter Forbes Smith, Hobart	+61 3 6231 0131	pforbessmith@hunttas.com.au
Peggy Cheong, Darwin	+61 8 8924 2600	pcheong@huntnt.com.au
Justine Matthews, Newcastle	+61 2 4925 5500	jmatthews@hunthunt.com.au

© Hunt & Hunt 2010

Disclaimer: The information contained in this case note is not advice and should not be relied upon as legal advice. Hunt & Hunt recommends that if you have a matter that is legal, or has legal implications, you consult with your legal adviser. If you no longer wish to receive this e-alert or any other publication from Hunt & Hunt, please email us at unsubscribe@hunthunt.com.au