RECENT DECISIONS

No real compromise: early 'walk away' offers may not be enough to obtain indemnity costs

Mega-Top Cargo Pty Ltd v Moneytech Services Pty Ltd [2016] NSWCA 3 (23 February 2016)

Link to decision

Summary

On 3 February 2016, the NSW Court of Appeal delivered a judgment on an application for indemnity costs by a successful respondent to an appeal. The Court of Appeal found that an Offer of Compromise that amounted to a request for a "capitulation" when no evidence was brought of significant costs being incurred by the successful party prior to the offer did not warrant the making of an indemnity costs order.

Facts

The respondent to an appeal, Moneytech Services Pty Ltd ('Moneytech'), served an Offer of Compromise on the appellant, Mega-Top Cargo Pty Ltd, on 26 October 2015, with the appeal ultimately dismissed by the Court of Appeal in favour of the respondent on 16 December 2015.

The Offer of Compromise was held to be a valid offer in line with the rules, as was the 'backup' covering letter that stated that if it was not a valid Offer of Compromise an order would be sought in line with the principles in *Calderbank v Calderbank* [1976].

Having successfully defeated the appeal, Moneytech sought to vary the costs order awarded by the Court of Appeal in its favour to reflect an indemnity costs order regarding the appeal.

The application was opposed by the appellant.

Outcome

While the Court of Appeal observed that the *Uniform Civil Procedure Rules 2005 (NSW)* may entitle parties serving an offer to a special costs order from the time the offer was made, the Court pointed out that the making of an Offer of Compromise no less favourable than the result achieved (such as a judgment for the respondent or defendant), does not give rise to an unconditional entitlement to an indemnity costs order.

The Court confirmed the now well settled approach that where no significant compromise (or no compromise at all) is made by a party, the default position provided for in the rules - namely that an indemnity costs order will be made - will not be applied.

Referring to the judgment of the Court of Appeal in *Taheri v Vitek (No. 2)* [2014] NSWCA 344 the Court noted that where an offer in large measure "invited capitulation" and there is no evidence before the Court as to the costs incurred by the party making the offer, or where it would be expected that virtually no costs would have been incurred by the date of the offer, it would not be appropriate for the non-acceptance of the offer to lead to an indemnity costs order.

Where the only measure of compromise involved on the part of the offering party was not to seek their costs and where those costs would not have been significant, the Court of Appeal was not prepared to make an indemnity costs order on a "walk away" Offer of Compromise, as it would not serve the public policy of encouraging settlement. The Court noted that the same principles would apply to a *Calderbank* letter.

As the successful respondent had not demonstrated that they had in fact incurred significant costs which they were "compromising" by way of the offer, the Court of Appeal declined to vary the standard costs order.

Implications

"Walk away bear own costs" Offers of Compromise and *Calderbank* letters are often used by defendants and their insurer clients early in proceedings to provide costs protection in the event a verdict for the defendant is eventually entered. However, defendants need to be aware that:

1. An Offer of Compromise or *Calderbank* offer of this nature does not provide costs protection where no real compromise can be displayed by the defendant.

2. Whilst an offer to 'walk away bear own costs' may set the parameters for negotiations or conduct of the litigation, the costs protection provided by offers served very early in proceedings – including before a defence is filed or simply upon receipt of service of the statement of claim – is minimal.

At any time when an Offer of Compromise or *Calderbank* offer to 'walk away' is made, a defendant should clearly set out the extent of the compromise being made by way of forgoing of the costs that have been incurred in addition to setting out the factual and legal basis in support of the offer.

Offers of Compromise of this nature should still be utilised by defendants and insurers but should be made at the appropriate time where a compromise can be demonstrated if the costs protection, for which the offers are served, is to actually be achieved.

For more information, please contact:

Paul Angus
Partner
T: 02 8257 5780
M: 0408 188 808
paul.angus@turkslegal.com.au