05/07; [2006] VSC 424

SUPREME COURT OF VICTORIA

STIPANOV v MIER (No 2)

Hollingworth J

8, 22 November 2006

COSTS – OFFER OF COMPROMISE – OFFER NOT ACCEPTED – CLAIM DISMISSED – APPLICATION FOR COSTS ON INDEMNITY BASIS AFTER OFFER OF COMPROMISE MADE – COSTS PRINCIPLES – WHETHER OFFEREE UNREASONABLY IGNORED A REASONABLE OFFER OF COMPROMISE: *RULES OF THE SUPREME COURT*, R26.08.

S. claimed damages in an action against M. for an amount in excess of $200,000. A first offer of compromise in the sum of $35,000 plus costs was made after the pleadings had closed and discovery and interrogation had been completed. A further offer of compromise in the sum of $120,000 plus costs was made on the third day of the trial. The claim was dismissed and the defendant sought costs on an indemnity basis from the date of the first offer of compromise.

HELD: Order the plaintiff pay the defendant's costs on a party/party basis.
1. Whilst a court has power to order that costs be taxed on a party and party basis, a solicitor and client basis, an indemnity basis or such other basis as the court may direct, the general rule is that the court will order costs to be taxed on a party and party basis.

2. The Rules do not provide for the situation where the plaintiff fails altogether and judgment is given for the defendant. However, it is well-established in such an event the court may, in the exercise of its general discretion, award costs to the defendant on a more generous basis than party and party from the time the offer was served.

3. The principle in *Calderbank v Calderbank* [1976] Fam 93; [1975] 3 All ER 333; [1975] 3 WLR 586 exposes a litigant to the risk of a costs order if, taking into account all relevant considerations including the facts known to the offeree at the time of the offer, the offeree unreasonably ignores a reasonable offer of settlement, whether made by letter or formal offer of compromise.

4. The reasonableness of the offer of compromise has to be ascertained on the facts known at the time of the making of the offer. At the time of the offer, it would have been reasonable for those advising S. to have concluded that she had strong prospects of establishing negligence and that damages in excess of $35,000 might be recovered. There is a particular danger in considering issues of witness credibility through the prism of hindsight.
***Richfield Investments v OCBC Ltd* [2004] VSC 351; and**
***Grynberg v Muller* [2002] NSWSC 350, applied.**

5. In the circumstances, S. did not act unreasonably in rejecting the first offer of compromise. Accordingly, S. should pay M.s costs on a party/party basis.

HOLLINGWORTH J:

1. On 27 October 2006, I handed down my reasons for decision in this proceeding.[1] They explain why I concluded there should be judgment for the defendant. In essence, whilst I found that the defendant did not do all that a reasonably prudent solicitor ought to have done in the circumstances, I was not satisfied that, but for the defendant's negligence, the plaintiff would have issued proceedings for common law damages within the relevant limitation period.

2. There is no dispute that it is appropriate that the plaintiff pay the defendant's costs of the proceeding. However, there is a dispute as to the scale which should apply. The plaintiff says that she should only pay costs on a party and party basis throughout the proceeding. On the other hand, the defendant says the plaintiff should pay party and party costs to 24 September 2005, thereafter costs on an indemnity basis. The defendant relies on an offer of compromise of 24 September 2005, in which he offered $35,000 plus costs.

3. For the sake of completeness, I should mention that the defendant made a further offer of compromise on the third day of the trial. That offer was for the sum of $120,000 plus costs.

Relevant costs principles

4. Section 24 of the *Supreme Court Act* 1986 provides that the Court has a discretion as to the making of orders for costs in respect of all matters before the Court, unless otherwise expressly provided for by that or any other Act or by the Rules.

5. Under the Rules, the Court has power to order that costs be taxed on a party and party basis, a solicitor and client basis, an indemnity basis or such other basis as the Court may direct[2] As a general rule, the Court will order costs to be taxed on a party and party basis.[3]

6. Rule 63.16 provides that where an offer of compromise is served and the offer has not been accepted at the time of verdict or judgment, liability for costs shall be determined in accordance with Rule 26.08.

7. Rule 26.08 contains a number of provisions which set out the costs consequences of a failure to accept an offer of compromise. The sub-rule which is relevant to an offer of compromise by a defendant is sub-rule (3), which is in the following terms:

> Where an offer of compromise is made by a defendant and not accepted by the plaintiff, and the plaintiff obtains a judgment on the claim to which the offer relates not more favourable to the plaintiff than the terms of the offer, then, unless the Court otherwise orders –
>
> (a) the plaintiff shall be entitled to an order against the defendant for the plaintiff's costs in respect of the claim up to and including the day the offer was served taxed on a party and party basis; and
>
> (b) the defendant shall be entitled to an order against the plaintiff for the defendant's costs in respect of the claim thereafter taxed on a party and party basis.

8. Rule 26.08(3) refers only to the situation where the plaintiff recovers a judgment that is not more favourable to the plaintiff than the terms of the offer. The rule is silent on the question of costs where the plaintiff fails altogether and judgment is given for the defendant. However, it is well-established that in such an event the Court may, in the exercise of its general discretion, award costs to the defendant on a more generous basis than party and party from the time the offer was served.

9. The principle in *Calderbank v Calderbank*[4] exposes a litigant to the risk of a costs order if, taking into account all relevant considerations including the facts known to the offeree at the time of the offer, the offeree unreasonably ignores a reasonable offer of settlement, whether made by letter or formal offer of compromise.

10. As Byrne J observed in *Mutual Community Ltd v Lorden Pty Ltd*[5]:

> The policy of the Court is to encourage litigating parties to undertake genuine settlement negotiations and, for the purpose, to face up to serious offers of settlement... The response of a litigant in receipt of an offer of settlement will always be affected by the prospect that the sum which the Court might order including party and party costs may be less advantageous than the terms of the offer. Experience, however, shows that this prospect alone is not always sufficient to compel a litigant to face up to the offer. The further prospect of a super-added costs penalty if a reasonable offer be not accepted is a salutary inducement to an offeree to undertake this often painful task...

11. In *Richfield Investments Pty Ltd v Oversea-Chinese Banking Corporation Ltd*[6], Redlich J carried out a comprehensive review of the authorities in relation to the award of costs on a higher than usual basis. In particular, he considered whether, once an offer of compromise was made, there was a *prima facie* presumption that indemnity costs should be ordered, unless the party rejecting the offer could show that it was reasonable not to accept the offer.[7] After a detailed examination of cases in the Federal Court, the Courts of Appeal in New South Wales and Queensland, and of single judges in this Court, his Honour concluded that:

> ...the preponderance of authority, and the weight of the recent decisions is to the effect that there is no rule, predisposition, presumption or guideline to the effect that a failure to obtain a judgment

> more favourable than a rejected Calderbank offer will, in the absence of persuasion to the contrary, lead to a special costs order.[8]

I respectfully agree with and adopt Redlich J's analysis and conclusion. In any event, the outcome in this particular case would be the same, even if (contrary to the above) there were such a *prima facie* presumption.

12. The final general observation which I wish to make is that courts have warned of the dangers of judging the reasonableness of a settlement offer through the prism of hindsight. As Redlich J observed in *Richfield Investments,* there is a real risk that a court, upon making findings concerning contested questions of fact, may too readily embrace a submission that it was always inevitable that the proceeding would fail.[9] As Hamilton J said in *Grynberg v Muller* "These submissions focus the bright light of hindsight. Hindsight sings a siren song of which judges must be cautious."[10]

13. The question for me to consider is whether, taking into account all relevant considerations, including the facts known to the plaintiff offeree at the time of the offer, she unreasonably ignored a reasonable offer of compromise.

The circumstances of this case

14. At trial, the plaintiff asserted that her total damages claim was worth well in excess of $400,000. On the other hand, the figures put forward by the defendant at trial resulted in a nil or negative sum, if one deducted from any damages claim the amount of weekly payments received by Ms Stipanov. Because of my findings as to causation, it was not necessary for me to make any assessment of Ms Stipanov's damages. Even if I had made such an assessment, I would have to be careful to avoid judging the reasonableness of the offer by reference to that later assessment. That is because the reasonableness of the offer of compromise has to be ascertained on the facts known at the time of the making of the offer.

15. This proceeding was originally commenced in the County Court in March 2004. After a date had been fixed for trial in that Court, the plaintiff applied for a transfer to this Court under the *Courts (Case Transfer) Act* 1991. The defendant was not prepared to consent to the County Court having jurisdiction in excess of $200,000, but agreed to the transfer to this Court. An order for transfer was made in early September 2005. Although it does not appear that any particulars of loss and damage had been delivered, it is reasonable to assume that at that time the plaintiff's claim was believed to be for an amount in excess of $200,000.

16. At the time when the first offer of compromise was made in late September 2005, the pleadings had closed and discovery and interrogation had been completed.

17. Two matters which ultimately played a large role in my causation findings were the April 1998 letter of advice from Maurice Blackburn & Co ("MBC") to the plaintiff, and my adverse findings about the plaintiff and her husband as witnesses.

18. At the time of the first offer, the MBC letter had been listed in the plaintiff's discovery. However, it seems that its significance in terms of causation was not really appreciated by either side until the trial. Certainly, it was not the subject of any pleading by the defendant until the amended defence of 12 May 2006, when he raised it for the first time.

19. Although the original defence denied that the plaintiff had suffered any loss, arguments about causation did not take on any great significance until the trial. From the way in which the case was prepared for trial and presented before me, I conclude that at all times up until well into the trial, both sides perceived that the principal areas of dispute were whether the defendant had been negligent and the various quantum issues. At the time of the offer, it would have been reasonable for those advising the plaintiff to have concluded that the plaintiff had strong prospects of establishing negligence, and that damages in excess of $35,000 might be recovered.

20. There is a particular danger in considering issues of witness credibility through the prism of hindsight. In my earlier reasons for decision, I explained why I could not accept the reliability or accuracy of much of what Ms Stipanov said, and why I formed such an adverse view as to Mr McBain's credibility. But these conclusions were only arrived at after hearing evidence over

several weeks. It can be very difficult to predict how a particular witness will perform under the pressures of giving evidence in court, or may be perceived by an unknown judge.

21. Having regard to all these matters, I do not believe that the plaintiff acted unreasonably in rejecting the first offer of compromise. It follows that the plaintiff should pay the defendant's costs on a party/party basis.

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[1] [2006] VSC 258.
[2] Rule 63.28
[3] Rule 63.31.
[4] [1976] Fam 93; [1975] 3 All ER 333; [1975] 3 WLR 586.
[5] Unreported Supreme Court of Victoria, Byrne J, 28 April 1993, 12-13.
[6] [2004] VSC 351.
[7] Apparently first put forward by Rolfe J in *Multicon Engineering Pty Ltd v Federal Airports Corporation* [1996] NSWSC 212; (1996) 138 ALR 425.
[8] *Richfield Investments Pty Ltd v Oversea–Chinese Banking Corporation Ltd* [2004] VSC 351, [72].
[9] Ibid, [36].
[10] [2002] NSWSC 350, [48].

APPEARANCES: For the plaintiff Stipanov: Mr A Ingram, counsel. Holding Redlich, solicitors. For the defendant Mier: Ms S Manova, counsel. Lander & Rogers, solicitors.
