Brookhollow P/L v R&R Consultants P/L & Philip Davenport (No 2) [2006] Adj.L.R. 01/30

JUDGMENT : Palmer J : Supreme Court of New South Wales. 30th January 2006

1 I delivered judgment in this matter this morning. The Plaintiff was unsuccessful in the case and the question which is now debated before me is whether the Plaintiff should be ordered to pay costs on an indemnity basis as from a variety of dates proffered by the First Defendant according to what are said to be Calderbank offers.

2 In evidence is a chain of correspondence between the parties' solicitors. The first is a letter dated 11 May 2005. I think it is conceded by Mr Wilson, and very properly so, that that letter did not constitute a Calderbank offer in itself and I do not think I need to consider it further.

3 The second letter is dated 13 July 2005. That letter puts forward an offer by the First Defendant to accept payment of $150,000 with no order as to costs being made in the proceedings. It will be recollected that the principal sum claimed by the First Defendant in the proceedings was $169,494. There is an alternative offer put in the letter of 13 July and that is an offer to accept payment of $150,000 with no order as to costs, together with a mutual release by the parties in relation to all claims arising out of the subject project.

4 The complaint which is made about that letter by the Plaintiff is, firstly, that the time allowed for the Plaintiff to consider the offer was unreasonably short. The offer was sent at 7.11pm on 13 July 2005 and the letter stated that the offer was capable of acceptance until 4pm on Friday 15 July 2005. The second complaint made about the letter is that the reasons given by the First Defendant in that letter as to why its defence of the proceedings would be successful are not in essence the reasons upon which First Defendant ultimately succeeded.

5 I think that the time allowed in the offer was unreasonably short. Even though the case was due to commence on 19 July at the time that this letter was sent, I think the time allowed for a proper consideration of the offers contained in it was unreasonable. I cannot see why the First Defendant could not have made its offer a few days before 13 July if it seriously intended to make an offer and to allow a reasonable time for the Plaintiff to consider it.

6 I will come to the second reason of complaint against this letter shortly but in summary I can say that I do not regard that the letter of 13 July 2005 as constituting an offer for compromise which the Plaintiff ought reasonably to have accepted.

7 The First Defendant's solicitor wrote on 15 July 2005 after the Court had vacated the hearing which was due to commence on 19 July. In that letter the First Defendant's solicitor inquired, in effect, whether there was any point in seeking their client's instructions to make another offer to the Plaintiff. Apparently there was no response to that letter.

8 On 11 November 2005, the First Defendant 's solicitors wrote to the Plaintiff's solicitors making an offer that the First Defendant would accept payment of $140,000 with no order as to costs. The offer was limited to expire on 15 November 2005 in light of the fact that the proceedings were due to commence on 21 November. Again, the complaint which is made about this offer is that the time allowed to the Plaintiff to consider it was too short and, secondly, that there were no reasons set forth in that letter or referred to by reference to the earlier letter of 13 July upon which the First Defendant ultimately succeeded.

9 In my view, bearing in mind that an offer of a precise sum had been made to the Plaintiff in July 2005, the time limited for acceptance of the offer made by the letter of 11 November 2005 was not unreasonably short. It seems to me that both parties would have had ample time in the weeks preceding the trial which was to commence on 21 November to consider the prospects of success or failure and the economic consequences thereof and to formulate what parameters for settlement might reasonably be open. It seems to me, therefore, that a period of a matter of days limiting the offer of 11 November 2005 is not unreasonably short.

10 As to the absence of reasons in the letter of 13 July 2005 as to why the Plaintiff's case must fail, I do not think that this is critical. What has happened in this case is a commonplace of litigation. The pleadings, such as they were, ventured a number of issues for trial. When the matter was close to coming on for hearing, no doubt counsel on both sides addressed their minds more closely to those issues which had been pleaded and those issues which commended themselves, even though they had not been pleaded. The issues which were actually debated at the trial departed considerably from the issues raised by the pleadings, yet both parties grappled with those issues fully and fairly and there was no complaint that any party was taken by surprise. Litigation is fraught with risk, as every lawyer knows and advises his or her client. The point that one thinks good six months before the trial, does not seem so good the night before the trial. That is a frequent occurrence and the parties often have to deal with that.

11 I do not think that it is determinative in the consideration as to whether an indemnity costs order should be made that the offeror in a Calderbank letter has set out therein the winning point, if I may call it that, in the offeror's case. It seems to me that, as I say, it being commonplace that points arise during the course of preparation immediately before the trial, and even during the course of trial, ultimately the consideration for settlement which the parties must reasonably take into account is this: "having regard to the vagaries of litigation, what is the price for a commercial settlement of the matter which I am prepared to pay?"

12 If a party, perhaps misadvisedly thinks that its case is impregnable and refuses all offers of compromise, it takes the chance that opposing counsel's labours, perhaps in the midnight hours before the trial, produce "the rabbit out of the hat" by way of a point which ultimately proves invincible.

13 I think that the letter of 11 November 2005 constituted a Calderbank offer in an amount which was more favourable to the Plaintiff than the result which the First Defendant has actually achieved in the proceedings. It seems to me that this is a proper case in which the Court should order that the Plaintiff pay the First Defendant's costs on an indemnity basis as from the close of the offer which was set forth in the 11 November letter.

14 Accordingly, the orders of the Court are that the Plaintiff's Summons be dismissed. The Plaintiff will pay the First Defendant's costs of the proceedings on the party/party basis up to and including 15 November 2005 and thereafter on the indemnity basis.

15 The exhibits may be returned.

16 There will be a stay of the judgment for a period of seven days from today, subject to any extension which the Court of Appeal may make.

Plaintiff – A. di Francesco (Sol) instructed by Home Wilkinson Lowry
1st Defendant – B. Wilson instructed by McMahons National Lawyers
2nd Defendant – Submitting appearance