COSTS JUDGMENT : Einstein J. Supreme Court New South Wales, Equity Division T&C List. 17th June 2008

1 Following the delivery of the reserved judgment on 5 June 2008, the parties have addressed on the appropriate orders to be made with respect to costs.

2 There is no substance in the plaintiffs claim to an order that the first defendant pay its costs on an indemnity basis. The proposition was put forward on three bases:

i. that the first defendant should have known that its defence would fail, in the sense that it had no reply to the facts or to the law, in relation to the Durham determination issue;

ii. that it was plainly unreasonable for the first defendant to have conducted its case with respect of "copy" of the adjudication application in the manner which it did;

iii. that the first defendant unreasonably rejected an offer forwarded to its solicitors on 7 April 2008.

3 The propositions put in i and ii are rejected.

4 Insofar as the third proposition is confirmed, the claim for indemnity costs fails for the following reasons put forward by the first defendant.

The Calderbank letter contained no element of compromise

5 The matters which inform the court's decision include the following:

i. The question for the Court in determining whether to make an indemnity costs order is whether it was unreasonable for the first defendant to not accept the plaintiffs' offer. Giles JA expressed the test in ***SMEC Testing Services Pty Ltd v Campbelltown City Council*** [2000] NSWCA 323 at [37] as:

"… *whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs …*"

ii. In answering this question, the Court must be satisfied that:

a) the *Calderbank* offer is a genuine offer of compromise: ***Leichhardt Municipal Council v Green***, [2004] NSWCA 341 at [21]-[24], [36] per Santow JA (Stein JA agreeing) and ***Herning v GWS Machinery Pty Ltd (No 2)*** [2005] NSWCA 375 at [4]-[5] per Handley, Beazley and Basten JJA; and

b) the offeree has been provided with an appropriate opportunity to consider and deal with the offer: ***Elite Protective Personnel v Salmon*** [2007] NSWCA 322 at [99], referring to ***Donnelly v Edelsten*** (1994) 49 FCR 384 at 396.

iii. The claimant bears the onus to establish that it was unreasonable for the offeree to refuse the offer: ***Herning v GWS Machinery Pty Ltd (No 2)*** [2005] NSWCA 375.

iv. The failure of an offeree to accept a *Calderbank* offer which was not bettered on judgment will <u>not</u> lead to a presumption that the offer was unreasonably rejected: ***MGICA (1992) Pty Ltd v Kenny & Good Pty Ltd*** (1996) 70 FCR 236 at 239 per Lindgren J.

v. Nor does the fact that the offeree ends up worse off than if the offer had been accepted warrant departure from the usual position: ***SMEC Testing Services Pty Ltd v Campbelltown City Council*** [2000] NSWCA 323 at [37], per Giles JA.

vi. Accordingly, the plaintiffs' submissions that the first defendant's case was bound to fail (in relation to <u>both</u> the "Durham determination issue" and the issue as to the number of pages served on the plaintiffs) are misconceived. Such a submission requires the Court to re-consider the issues.

Plaintiffs' offer not a genuine offer of compromise

6 Furthermore the plaintiffs submission suffered from the following difficulties:

i. The purported *Calderbank* offer from the plaintiffs, as set out in their letter of 7 April 2008, called for the first defendant to give up its defence in these proceedings in its entirety and pay for the plaintiffs' costs on a solicitor-client basis to the date of the letter.

ii. There is no element of compromise in the offer whatsoever. Instead, it was a demand for capitulation: ***Fyna Foods Australia Pty Ltd v Cobannah Holdings Pty Ltd (No 2)*** [2004] FCA 1212.

iii. Further the capitulation required by the letter was to pay the plaintiffs' costs on an indemnity basis. It went far beyond a "walk-away" offer.

[What element of 'comprise' requires was discussed by Giles J in ***Hobartville Stud v Union Insurance Co*** (1991) 25 NSWLR 358 at 368, where he said:

"*Compromise connotes that a party gives something away. A plaintiff with a strong case, or a plaintiff with a firm belief in the strength of its case, is perfectly entitled to discount its claim by only a dollar, but it does not in any real sense give anything away, and I do not think that it can claim to have placed itself in a more favourable position in relation to costs unless it does so.*"]

iv. Not only, was there no element of compromise, the "offer" sought more than the amount of costs the plaintiffs would have been entitled to recover:

a) pursuant to the rules; or

b) in accordance with the principles discussed by McHugh J in ***Re Minister for Immigration and Ethnic Affairs (Cth); Ex Parte Lai Qin*** (1997) 186 CLR 622, namely that where there has been a resolution of the substantive issues, the parties ought bear their own costs.

v. The offer, upon which the plaintiffs rely, did not represent a genuine attempt to reach a negotiated settlement but was issued as an attempt to trigger costs sanctions: ***Leichhardt Municipal Council v Green*** [2004] NSWCA 341 at [39] per Santow J. Similarly, Rogers CJ Comm D in ***Tickell v Trifleska Pty Ltd*** (1990) 25 NSWLR 353 at 355 said:

"*Whether in the totality of the circumstances, the offer by the plaintiff represented any element of compromise or whether it was merely, yet another, formally stated demand for payment designed simply to trigger the entitlement to payment of costs on an indemnity basis.*"

7 Hence the plaintiffs offer was unreasonable in what it sought from the first defendant in that:

i. it contained no element of compromise; and

ii. claimed more than what the plaintiffs would otherwise have been entitled to receive.

8 In the circumstances, there is no warrant for an order for indemnity costs.

Appropriate orders

9 The plaintiffs did not oppose a stay until Monday 23 June, the effect of which would be to delay the release of the money for a short period during the course of which the first defendant may seek an extension of the stay from the Court of Appeal. Unless an order releasing the monies to the plaintiffs was *now* made, they would have no right to such monies in the event that the stay was to lapse

10 The orders of the court are as follows:

(1) The Court declares that the purported adjudication determination by the second defendant (reference no 2007-NECA-026) is void;

(2) The Court declares that the purported adjudication determination by the second defendant (reference no 2008-NECA-001) is void;

(3) The Court orders that the judgment in proceedings 55025 of 2008 be set aside;

(4) The Court orders that the amount of $477,000 paid into the Court by the plaintiffs be released by the Court to the plaintiffs, together with any interest;

(5) The first defendant is to pay the plaintiffs' costs as agreed or assessed;

(6) Order 4 is to be stayed up to and including 23 June 2008.

Mr M Christie, Mr C Carter (Plaintiffs) instructed by Massey Bailey Solicitors agent for Pilley McKellar Pty Ltd
Mr J Simpkins SC, Mr D Price (Defendants) instructed by The Builders Lawyers