Clarity on offers of compromise

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A recent decision and changes to the UCPR have provided clarity.

Lately, there has been significant uncertainty regarding whether an offer of compromise (offer) expressed as "plus costs as agreed or assessed" is valid for the purposes of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR). This has been mainly caused by two apparently conflicting Court of Appeal decisions.

This uncertainty has now hopefully been dispelled for offers made prior to 7 June 2013 and thereafter by, respectively, a recent five-judge Court of Appeal decision and recent amendments to the UCPR.

Offers made from 7 June 2013 will be valid even if they expressly refer to a payment of costs on the bases outlined in the new UCPR r.20.26(3).

Relevant rules prior to 7 June

UCPR r.20.26(2) required that 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".

UCPR r.42.13A(2) provided that an accepted offer entitled the plaintiff to their costs assessed on the ordinary basis to the date of the offer, save for where it contained a proposed verdict for the defendant and the parties were to bear their own costs or the court ordered otherwise.

Inconsistent Court of Appeal decisions

In *Old v McInnes*,[1] the Court of Appeal held that an offer put as "plus costs as agreed or assessed" was invalid as it was not "exclusive of costs"; an offer only complied with UCPR r.20.26(2) if it was "exclusive of costs".

In *Vieira*,[2] the Court of Appeal, in a joint judgment, relevantly stated: "The UCPR are to be construed by reference to their apparent purpose. A mere reference to costs in an offer otherwise compliant with Pt 20, Div 4 will not take the offer outside the rules unless the reference operates inconsistently with the relevant costs rule ... The offer, if accepted, entitled the offeror to his costs: the offer did not seek to vary the effect of UCPR r.42.13A."

Though these "purposive" comments were strictly obiter, they appear to directly contradict *Old v McInnes* – an offer "plus costs as agreed or assessed" does not seem to operate inconsistently with UCPR r.42.13A(2), which did not otherwise preclude parties from separately agreeing costs.

Whitney v Dream Developments

Given this apparent inconsistency, in *Whitney*[3] a five-judge bench of the Court of Appeal convened to ascertain the validity of an offer expressed to be in accordance with UCPR r.20.26 for a sum of money plus costs "as agreed or assessed". It was open for acceptance for 28 days, but was not accepted.

The questions to be answered were whether:

- ☐ the offer complied with UCPR r.20.26(2);
- ☐ *Old v McInnes* was correctly decided;
- ☐ *Old v McInnes* and *Vieira* were inconsistent; and
- ☐ if the offer was non-compliant, it was otherwise effective as a Calderbank offer.

On 25 June 2013, Bathurst CJ, with whom Beazley P, McColl JA, Barrett JA and Emmett JA agreed, relevantly held that:

- ☐ the intention of "exclusive of costs" in UCPR r.20.26(2) is that an offer should not deal with costs at all, as any reference to costs removes the court's discretion under UCPR r.42.13A(2) to make a contrary order. The offer was therefore invalid;
- ☐ *Old v McInnes* was correct and the "purposive" comments in *Vieira* did not conflict with *Old v McInnes*, as reference to costs "as assessed or agreed" is unquestionably inconsistent with UCPR costs rules, as it removes the court's discretion under UCPR r.42.13A(2) to make a contrary order; and
- ☐ a non-compliant offer will not be effective as a Calderbank offer unless there is something in either its terms or surrounding its making that indicates it is intended to be relied upon on costs. The offer was held not to be a Calderbank offer.

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Recent changes to the UCPR

On 7 June 2013, prior to *Whitney*, but undoubtedly also due to the apparent judicial inconsistency, certain amendments to the UCPR[4] came into effect. Among other things, UCPR r.20.26(2) was replaced, so that now, an offer "must not include an amount for costs and must not be expressed to be inclusive of costs".[5]

A new UCPR r.20.26(3) was also inserted:

"(3) An offer under this rule may propose:

a) a judgment in favour of the defendant:

i) with no order as to costs, or

ii) despite subrule (2) (c), with a term of the offer that the defendant will pay to the plaintiff a specified sum in respect of the plaintiff's costs, or

b) that the costs as agreed or assessed up to the time of the offer was made will be paid by the offeror, or

c) that the costs as agreed or assessed on the ordinary basis or on the indemnity basis will be met out of a specified estate, notional estate or fund identified in the offer."

Effect of decision and amendments

Offers made prior to 7 June 2013 are:

- ☐ invalid as offers if they included a statement to the effect that the plaintiff would be paid costs "as agreed or assessed"; and
- ☐ valid offers if they were either silent about costs or expressly "exclusive of costs", and otherwise compliant with the UCPR, to either require payment of costs most likely assessed on the ordinary basis, unless previously agreed inter partes, if accepted.

Offers made from 7 June will be valid as offers of compromise even if they expressly refer to a payment of costs on the bases outlined in UCPR r.20.26(3).

These amendments significantly depart from the court's interpretation of the previous provisions and appear more aligned with the original intent of the offer of compromise mechanism. They also provide a new option of an offer of judgment in favour of the defendant plus a specified sum for the plaintiff's costs. This will be of particular interest to defendants who wish to explore the possibilities for settlement by making an offer for a liquidated sum for costs in addition to putting Calderbank offers.

As to whether invalid offers will necessarily be treated as Calderbank offers, *Whitney* was consistent with previous authority: such offers will only be seen as such if they separately meet the principles outlined in the Calderbank judgment.[6] ☐

ENDNOTES

1. *Old v McInnes and Hodgkinson* [2011] NSWCA 410.
2. *Vieira v O'Shea (No.2)* [2012] NSWCA 121.
3. *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188.
4. UCPR (Amendment No. 59) 2013.
5. UCPR r.20.26(2) (c).
6. *Calderbank v Calderbank* [1975] 3 All ER 333. ☐