



Costs and interim bills

By Peta Solomon

OFFERS OF COMPROMISE AND COSTS CONSEQUENCES

The rules with respect to the costs consequences of offers of compromise have changed in a number of significant ways since the commencement of the Uniform Civil Procedure Rules 2005 NSW (UCPR).

Where a defendant serves an offer of compromise in accordance with UCPR r20.26,¹ practitioners acting for plaintiffs should be aware of the risks of costs recovery after the service of the offer, in circumstances where the offer is subsequently accepted.

Costs consequences

The former Supreme Court Rules 1970 (NSW) Part 52A provided that where a plaintiff accepted an offer of compromise made in accordance with Part 22 r3(5), unless the court otherwise ordered, the defendant would be liable for the plaintiff's costs *up to and including the day the offer was accepted* [emphasis added]. Accordingly, any work done by the plaintiff's solicitor between the date of the offer and its acceptance was covered. Under the UCPR, depending upon when the offer is made and for how long it is left open, substantial costs can be incurred after the date the offer is made and before it is ultimately accepted. In addition, if made in proximity to the trial, provided that a defendant can demonstrate that the offer was left open for a time which is reasonable in the circumstances (r20.26(7)(b)), the plaintiff can become liable or at risk for substantial expenses in the period following the offer, such as witness preparation, standby fees, costs of international and other experts' and counsel's cancellation fees, etc.

One of the most significant consequences arises from the operation of UCPR r42.13A, which substantially changes the previous position that applied where offers made by a defendant were accepted. Rule 42.13A provides that where an offer is made by a defendant under r20.26 and it is not an offer in terms that if there be a verdict for the defendant and the parties are to bear their own costs, the plaintiff is entitled to an order against the defendant for the plaintiff's costs in respect of the claim, such an entitlement applies only up to the date when the offer was made,² unless the court otherwise orders.

Accessing costs assessment

In order to access the assessment system, parties are required to obtain formal orders. Only persons entitled to costs under an order of a court or tribunal may apply to the

manager for an assessment of costs. Accordingly, assessors take the view that the jurisdiction to assess costs is enlivened only when there is an order of a court or tribunal under s353 *Legal Profession Act 2004* (LPA).

In *Karam Chand Ramrakha v Mahendra Pal Chaudhry and the National Farmers Union*,³ Patten AJ commented "that matter was not argued fully before me, although there seems to be considerable force in it having regard to s353".⁴ In that case, an individual who considered that he had the benefit of an entitlement to costs under the UCPR, then applicable to the non-admission of a fact or document, sought to apply for assessment of those costs in circumstances where no order had been made. The Assessor and the Review Panel declined to assess, relying upon s353 LPA.

Costs and 'otherwise orders'

Where, following an offer of compromise, the plaintiff enters orders reflecting the terms of the offer which has been accepted, issues have arisen on assessment as to whether this amounts to an 'otherwise order' and/or whether the plaintiff's costs are confined to the costs incurred to the date of the order.

In such circumstances, it is clear that the Court has not 'turned its mind' to the issues that might ground an 'otherwise order'. Notwithstanding that there is an order that costs be payable 'as agreed or assessed', the scope of the costs to which the plaintiff is confined by the expression of the plaintiff's entitlement⁵ gives rise to questions as to whether it is an 'otherwise order' or a court order entitling costs to be payable up to the date (made upon and entered) and incidental to the proceedings generally.

Consideration should be given, in appropriate circumstances, as to whether the plaintiff can avoid the effect of r42.13A(2) by awaiting the expiry of the offer of compromise and making a subsequent offer to settle in the same amount and upon the same conditions, whether in accordance with r20.26 or otherwise.

TIME LIMITS TO ASSESS INTERIM BILLS

There is considerable uncertainty as to the time limits that apply for clients wanting assessments in relation to interim bills. Even if a client is billed monthly, a practice may not be protected from assessment, after 12 months from the date a bill of costs is rendered has elapsed. Section 334 LPA provides that costs that are the subject of an interim bill may be assessed under Division 11, either 'at the time of the interim bill or at the time of the final bill, whether or

not the interim bill has been paid'. Effectively, in long-running litigation, time may start to run for the client only when the final bill in the matter is rendered. Issues will arise as to what constitutes an interim bill and/or final bill, which will become particularly complex in circumstances where there are a number of retainers with a single client.

Assessment approaches

Varying approaches have been adopted by assessors, some taking the view that interim bills must be assessed within a 12-month time limit calculated from the date that bill was given. While some assessors have been prepared to give consideration to 'out of time' interim bills as being material relevant to the costs claimed in the 'within time' bills, they have declined to assess interim bills themselves where more than 12 months has elapsed from the date the bill was given.

Until recently, there have been two conflicting decisions on assessing interim bills. In *Retemu Pty Ltd v Joe Ryan*,⁶ Coorey DCJ held that the effect of s334 is to extend time for interim bills, with the effect that assessment runs 12 months from the date of the final bill. *Retemu* was considered in a decision of the Costs Court of the Supreme Court of Victoria relating to similar provisions.⁷ In *Dromana Estate Ltd v Wilmoth Field Warne*,⁸ Wood AJ determined that the provision did not operate to extend time for interim bills that are otherwise out of time. That decision was put on the basis, *inter alia*, that the use of the word 'bill' in s3.4.38 LPA 2004 (Vic) (equivalent of the NSW s350 LPA), without differentiation between interim or final, 'must as a matter of logic mean that the term bill used in 3.4.38 includes both an interim and a final bill'.⁹ As that section prescribed a time limit of 12 months, the time limit for review of both interim and final bills is 12 months from issue.

Queensland authority

A recent decision in Queensland, *Turner v Mitchells Solicitors*,¹⁰ has, however, considered both the *Dromana* and *Retemu* cases and followed the interpretation adopted in *Retemu*. The case considered s333 LPA 2007 (Qld), the equivalent of s334. McGill DCJ decided that if there is an interim bill, it may be assessed either at the time of the interim bill or at the time of the final bill, but noted some qualifications. If an application was made to assess only the costs covered by the interim bill, that application would have to be made within 12 months of the date the bill was given or request for payment was made. If, however, the legal costs included in an interim bill were to be assessed at the time of the final bill, the application would have to be made within 12 months of the final bill. This does not mean that bills for all work done for a client, which may have been given more than 12 months prior, will be assessable at the time of the final bill. It will have to be demonstrated that the bill sought to be assessed at that time is properly characterised as covering part of the retainer under which the final bill is rendered.

The Queensland authority indicates that consideration is to be given to the scope of the retainer and, in this regard, the definition of 'the work' in costs agreements should be

carefully considered, including in circumstances where staging of work is provided for. The question of what legal services the firm was retained to provide will be a question of fact, which the court acknowledged may involve some complexity – such as where work is done outside of the definition of the work, or for longstanding clients who engage the firm on multiple matters. What constitutes an interim bill and a final bill will be determined by the legal services the firm was retained to provide and may, as the court notes, give rise to questions of whether 'later instructions to perform additional legal services amount to a variation of the earlier costs agreement, or a new agreement which incorporates the terms of the earlier costs agreement'¹¹ or whether the provision of subsequent additional legal services operates as a new retainer or expands the scope of the earlier retainer so as to postpone the opportunity to render a 'final' bill.¹² ■

Notes: **1** 'Making of offer'. **2** Rule 42.13A(2). **3** [2007] NSWSC 991. **4** At [33]. **5** In r42.13A(2). **6** NSW District Court (unreported), 16 April 2010. **7** The Victorian equivalent of s334 being s3.4.37. **8** [2010] VSC 308. **9** At [12]. **10** [2011] QDC 61 (29 April 2011). **11** At [29]. **12** *Ibid*.

Peta Solomon is a director at Costs Partners.

PHONE (02) 9006 1033 **EMAIL** petas@costspartners.com.au. Please contact her if you have any queries or require further information.

PROFESSIONAL MEDICAL NEGLIGENCE REPORTS

Susan Welling & Associates



acting as independent intermediary between specialist doctors and solicitors.

We have a wide range of specialists available to provide expert medical negligence reports.

- Accident & Emergency Physician • Anaesthetist
 - Breast & General Surgeon • Cardiologist
- Cardiovascular and Thoracic Surgeon • Chiropractor & Osteopath
 - Colorectal Surgeon • Dentist • Dermatologist • Endodontist
 - Ear, Nose & Throat Surgeon • Gastroenterologist
- General Physician • General Practitioner • General Surgeon
- Geneticist • Haematologist • Hand, Plastic & Reconstructive Surgeon
 - Infectious Diseases Physician • Intensivist
- Maxillofacial & Oral Surgeon • Neonatal Physician • Neurologist
 - Neurosurgeon • Obstetrician/Gynaecologist • Oncologist
 - Ophthalmologist • Orthodontist • Orthopaedic Surgeon
- Paediatrician • Paediatric Anaesthetist • Paediatric Cardiologist
 - Paediatric Infectious Diseases Physician • Paediatric Neurologist
 - Paediatric Orthopaedic Surgeon • Paediatric Surgeon
 - Paediatric Radiologist • Paediatric Thoracic Physician
 - Pathologist • Pharmacologist • Psychiatrist
 - Renal Physician • Radiologist • Rheumatologist
 - Thoracic/Respiratory Surgeon • Upper GI Surgeon
 - Urologist • Vascular Surgeon

PO Box 672, Elsternwick, VIC 3185
 Tel: 03 9576 7491 Fax: 03 9576 7493
 Email: susanw@smartchat.net.au