James v The Owners – Strata Plan No 11478 (No 2) - [2016] NSWSC 1701

Supreme Court

New South Wales

Medium Neutral Citation:	**James v The Owners – Strata Plan No 11478 (No 2) [2016] NSWSC 1701**
Hearing dates:	On the papers
Date of orders:	01 December 2016
Decision date:	01 December 2016
Jurisdiction:	Equity
Before:	Darke J
Decision:	Order made for indemnity costs pursuant to UCPR r 42.15A
Catchwords:	COSTS – offers of compromise – "walk away" offer made by defendants – offer not accepted by plaintiff – defendants obtain order no less favourable than terms of offer – whether offer triggers prima facie entitlement to indemnity costs – Uniform Civil Procedure Rules 2005 (NSW) r 42.15A
Legislation Cited:	Uniform Civil Procedure Rules 2005 (NSW), r 42.15A
Cases Cited:	James v The Owners – Strata Plan No 11478 [2016] NSWSC 1558 Leach v The Nominal Defendant (No 2) [2014] NSWCA 391 Taheri v Vitek (No 2) [2014] NSWCA 344 Prospect Resources Limited v Molyneux [2015] NSWCA 171 Regency Media Pty Limited v AAV Australia Pty Limited [2009] NSWCA 368
Category:	Costs
Parties:	Jennifer Elizabeth James (Plaintiff) The Owners – Strata Plan No 11478 (First Defendant) Robert Anderson (Second Defendant) Advanced Community Management Pty Limited (Third Defendant)

Representation:	Counsel: In person (Plaintiff) Mr S A Adair (Second and Third Defendants) Solicitors: Sparke Helmore Lawyers (Second and Third Defendants)
File Number(s):	2014/37203
Publication restriction:	None

Judgment

1. Judgment was delivered in this matter on 3 November 2016 (see *James v The Owners – Strata Plan No 11478* [2016] NSWSC 1558). The Court concluded that the plaintiff's Amended Statement of Claim should be dismissed with costs. Orders that effect were made on that day.

2. On 14 November 2016 the second and third defendants filed a Notice of Motion pursuant to Uniform Civil Procedure Rules 2005 (NSW) (" UCPR ") r 36.16(3A) for a variation of the costs order in their favour. The second and third defendants seek an order that the plaintiff pay their costs of the proceedings on the ordinary basis up to and including 1 April 2016, and on an indemnity basis from 2 April 2016.

3. The application is based upon the failure of the plaintiff to accept an offer of compromise that was made by the second and third defendants pursuant to UCPR r 20.26 . The offer was made in the evening of 1 April 2016. The offer, which was open for acceptance for a period of 14 days, was of a "walk away" variety. The second and third defendants offered to compromise all of the plaintiff's claims against them on the basis that there be judgment for the second and third defendants, with no order as to costs. The offer was served on the solicitor who had been acting for the plaintiff since the commencement of the proceedings.

4. The parties to the motion were directed to file and serve written submissions. The second and third defendants filed and served submissions on 21 November 2016 as directed. The plaintiff failed to file and serve submissions by 28 November 2016 as directed. No request for an extension of time was made. However, in an email sent to chambers (which was copied to the solicitors for the second and third defendants) some statements were made concerning costs. Those statements have been taken into account as if they were submissions on the motion. In these circumstances, the Court decided that it was appropriate, and in accordance with the provisions of ss 56 to 58 of the *Civil Procedure Act 2005* (NSW) , to proceed to determine the motion on the papers.

5. The second and third defendants rely upon UCPR r 42.15A which is in the following terms:

> (1) This rule applies if the offer is made by the defendant, but not accepted by the plaintiff, and the defendant obtains an order or judgment on the claim no less favourable to the defendant than the terms of the offer.

(2) Unless the court orders otherwise:

(a) the defendant is entitled to an order against the plaintiff for the defendant's costs in respect of the claim, to be assessed on the ordinary basis, up to the time from which the defendant becomes entitled to costs under paragraph (b), and

(b) the defendant is entitled to an order against the plaintiff for the defendant's costs in respect of the claim, assessed on an indemnity basis:

(i) if the offer was made before the first day of the trial, as from the beginning of the day following the day on which the offer was made, and

(ii) if the offer was made on or after the first day of the trial, as from 11 am on the day following the day on which the offer was made.

6. The offer appears to comply with the requirements for a valid offer pursuant to UCPR r 20.26 . In that regard the terms of the offer accord with the requirements of UCPR r 20.26(1)-(3) , and it seems to me that the closing date for acceptance of the offer (15 April 2016, being 14 days after the date of the offer) was reasonable in the circumstances, particularly given that by 1 April 2016 the pleadings had been closed for more than 4 months, the parties had served their affidavit evidence, and the matter had been set down for final hearing to commence on 16 May 2016 (see UCPR r 20.26(5)(b)) .

7. It is clear that the offer was not accepted by the plaintiff, and that the second and third defendants obtained an order with respect to the plaintiff's claim no less favourable to them than the terms of the offer. Accordingly, unless the Court orders otherwise, the second and third defendants are entitled to orders to the effect of that sought in their motion.

8. It is well established that in this situation there is an onus upon the plaintiff to persuade the Court that it should "order otherwise" so that indemnity costs are not ordered (see *Leach v The Nominal Defendant (No 2)* [2014] NSWCA 391 at [29] and [45] per McColl JA, with whom Gleeson JA and Sackville AJA agreed).

9. The second and third defendants submitted that a "walk away" offer made by a defendant is capable of triggering the operation of UCPR r 42.15A such that indemnity costs is ordered. Reference was made in that regard to *Taheri v Vitek (No 2)* [2014] NSWCA 344 at [8] (Bathurst CJ, with whom Emmett and Leeming JJA agreed). The second and third defendants also referred, fairly, to *Regency Media Pty Limited v AAV Australia Pty Limited* [2009] NSWCA 368 in which it was stated by the Court (at [31]) that while an "invitation to surrender" can result in the successful triggering of the indemnity costs mechanisms under the rules, "the claim or defence would have to approach something of the character of being frivolous or vexatious for that to be the case". It was submitted that, even applying that principle, the claims advanced by the plaintiff were of a nature approaching frivolity, and lacked substance.

10. However, as stated by Ward JA (with whom Beazley P and Leeming JA agreed) in *Prospect Resources Limited v Molyneux* [2015] NSWCA 171 at [94] , *Regency Media Pty Limited v AAV Pty Limited*

(supra) does not lay down a rigid rule in this regard, and that what amounts to a derisory offer as opposed to an offer containing a sufficient element of compromise is to a large extent a matter of impression.

11. Moreover, the statement made in *Regency Media Pty Limited v AAV Pty Limited* (supra) must be considered in its context. It is apparent that the Court placed emphasis on the fact that the case, which concerned an issue of contractual interpretation, was an "all or nothing case", not one where a process of assessment was involved in which the end result could vary over a range. Further, the offer, which was made at an early stage of the proceedings, was seen to involve an element of compromise that was, at best, of limited significance, and was described as derisory. The offer was regarded by the Court as an invitation to surrender "rather than any form of commercial compromise". The Court continued (at [32]):

> The normal order for costs, even in a clear case, is that each party bears its own costs without full indemnity. If a derisory offer, of the kind made in these proceedings, could result in an order for indemnity costs, then it is likely that many, perhaps most, contract interpretation disputes would result in an indemnity costs order, if the formality of an offer in accordance with the rules had been made at an early stage. If the appellant were to succeed in the present case, it is quite likely that such an offer would accompany most statements of claim as a matter of commercial practice. The purpose of the special order – to encourage settlement – would no longer be served. An order for indemnity costs could, in our opinion, become the normal order in many commercial disputes.

12. The plaintiff's claims against the second and third defendants, which were essentially claims for compensation or damages for breach of an alleged duty of care, or for oppressive conduct, were not of an all or nothing character. Moreover, by the time the offer was made (more than 2 years after the commencement of the proceedings) the second and third defendants must have incurred a substantial amount of costs in their defences to the claims. The offer, which involved the giving up of any claim against the plaintiff for costs, cannot in my view be regarded as derisory, or as an invitation to surrender rather than any form of commercial compromise. In my opinion, the offer truly involved a significant element of compromise. It was made at a time when the parties were in a good position to give due consideration to the strengths and weaknesses of their cases, before finally proceeding towards trial. The offer was made approximately 6 weeks before the hearing was due to commence, and not long before the parties were due to attempt mediation. It seems to me that the public policy of encouraging settlement would be served by holding that the offer successfully triggered the indemnity costs mechanisms under the rules.

13. For the above reasons, it is my opinion that the offer made by the second and third defendants on 1 April 2016 was an offer of compromise of a character that engaged the operation of UCPR r 42.15A(2) . It therefore falls to the plaintiff to show that in the particular circumstances of the case the Court should "order otherwise" than as provided for in UCPR r 42.15A(2) .

14. As noted earlier, the plaintiff did not file and serve written submissions as directed on the question of costs. However, in an email sent to chambers on 21 November 2016 the plaintiff suggested that the costs of the hearing were exacerbated by her case being "forced on". That may be taken as a reference to the fact that the Court refused a number of adjournment applications

made by the plaintiff. The first of those applications was made on 6 May 2016, shortly after the plaintiff lost the services of her solicitor and the counsel she had expected to appear for her at the hearing. As stated in the principal judgment (at [11]), the conduct of the case by the plaintiff caused some prolongation of the hearing. However, I do not think that these circumstances afford a good reason to depart from the prima facie position established by UCPR 42.15A(2) . The real cause of the second and third defendants incurring the costs of the hearing was the decision made by the plaintiff to not accept their offer of compromise. She could have proceeded solely against the Owners Corporation.

15. The plaintiff also suggested that no reasonable compromise was offered to her at the mediation (which was held on 26 April 2016). It is not clear what the plaintiff considers to be a reasonable compromise. In any event, this circumstance, even if correct, does not in my view afford a good reason to "order otherwise". The fact remains that the plaintiff failed to accept an offer which involved a significant element of compromise.

16. No other matters were advanced by the plaintiff which might justify a departure from the prima facie position. It was not suggested that, in the circumstances, it was reasonable for the plaintiff to not accept the offer. In any case, I would not conclude that it was reasonable to not accept the offer, having regard to the circumstances in which the offer was made and the weakness of the plaintiff's case.

17. For the above reasons, the Court orders:

    1. That order 2 made on 3 November 2016 be varied so that it no longer applies to the second and third defendants.

    2. That the plaintiff pay the second and third defendants' costs of the proceedings up to and including 1 April 2016 on the ordinary basis, and from 2 April 2016 on an indemnity basis.

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Decision last updated: 01 December 2016