It Takes Two to Tango: Judicial Encouragement of ADR

David Levin Q.C.[1]

1. Court Rules and practice across Australia reflect that a party rejecting a proposed settlement offer bears little risk of an adverse costs order unless the offer exceeds the judgment or award ultimately obtained.[2] Until recently this was also the situation in the U.K.: "A payment into court [or offer of compromise] was the touchstone in relation to costs – if it was beaten by a plaintiff, the plaintiff got their costs; if the plaintiff failed to beat it the defendant got their costs. There was hardly an exception to that rule."[3]

2. Of course it is the policy of the law that litigants are encouraged to settle their differences upon reasonable terms.[4] But is it appropriate merely to look at the offer and assess it against the judgment, taking into account the passage of time and the non-financial elements which may be contained in either the offer or the judgment? Should courts look at the negotiating approach adopted by one or other of the parties, and consider whether the approach which was conducive to achieving settlement?[5] Should the rules of court be redrafted more constructively to encourage and support the adoption of a sensible negotiating position prior to litigation commencing and/or prior to adjudication by the court? Should a high-handed rejection of a low but not obviously unreasonable offer which stymies further ADR endeavours put the rejecting party, although

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2 See, for example, in Victoria R.26; in Federal Court O.24; in NSW Rules 20 and 42

3 *Straker v Tudor Rose (a firm)* [2007] EWCA Civ. 368 per Waller LJ at paragraph 2

4 Per Jackson J in Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2008] EWHC 2280 (TCC) at para 43; Aquatec-Maxcon Pty Ltd v Barwon (No 8) [2007] VSC 363 per Byrne J at [35]

5 Byrne J considered this approach inappropriate in Aquatec-Maxcon Pty Ltd v Barwon (No 8) (supra) at [36]

ultimately successful, at risk of losing all or part of the costs even if it did obtain more than any offer from the unsuccessful party?

3. I wish to advance the following propositions:

- Court rules and practice in relation to the awarding of costs should continue to encourage negotiated settlements
- Encouragement of negotiated settlements is not only to be measured by reference to the judgment ultimately obtained by the successful party. Broader considerations ought to come into play.
- Given that a successful negotiation can only be arrived at by two willing parties, the manner in which a party negotiates may promote or stymie a successful outcome.
- If the ultimately successful party has adopted an obdurate attitude towards negotiation, thereby allowing or compelling the expensive course of litigation to run to its ultimate end in judgment, the judicial discretion as to costs might be exercised against it.

Discretion as to Costs

4. Costs are generally in the discretion of the adjudicating court.[6] In accordance with the relevant legislative powers the respective Rules of Court[7] of the various jurisdictions in Australia (or the current practice developed over many years) generally[8] provide for the costs of the successful party being paid by the unsuccessful party. Judicial authority

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6 s 24(1) Supreme Court Act 1986 (Vic); s.98 Civil Procedure Act 2005 (NSW); s.43 Federal Court of Australia Act 1976 (Cth)

7 Rule 42.1 Uniform Civil Procedure Rules 2005 (NSW) provides:
"Subject to this Part, if the court makes any order as to costs, the court is to order that the costs follow the event unless it appears to the court that some other order should be made a to the whole or any part of the costs."

8 There are exceptions to the general practice: many of them are discussed in Williams, Civil Procedure Victoria at [63.02.80] to [63.02.145]

supports this proposition.[9] The extent to which any costs order will indemnify the recipient is also within the discretion of the court, so it may order party-party costs, solicitor-client costs or a full indemnity in appropriate circumstances. It is common knowledge that party-party costs will leave a successful party out of pocket. The justification for this disparity was explained by Kirby P (as he then was) in Huntsman Chemical Co Aust Ltd v International Pools Australia Pty Ltd[10]:

> "4. The fact that a party and party costs order leaves some burden of costs upon a successful party may seem unjust. But in highly developed legal systems of the world it is not unknown to have a general regime whereby each party to litigation bears its own costs. This, for example, is the ordinary position in courts in the United States of America. It was, as Mahoney JA has explained, the original position of the common law of England. The ordinary rule in this court (as in most courts of Australia) is that a successful party usually secures no more than an order that its costs should be paid on a party and party basis. See Milosevic v Government Insurance Office of New South Wales[11]. Doubtless behind these rules lies a social judgment that dispute resolution in the courts is expensive but, to ensure access to the courts, full indemnity costs are not ordinarily ordered. Some costs are borne even by successful parties as an incident to the curial arrangements which we accept as generally just. There is no rule that in commercial or any other class of case save those specifically provided by the rules, special costs orders are made. Any shift to such a general or common rule is one which should be made by the legislature or by the rule-maker.

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9 Ritter v Godfrey [1920] 2 KB 47; Hughes v Western Australian Cricket Association (Inc) (1986) ATPR 40-748

10 (1995) ATPR 41-403 at 40,445

11 (1993) 31 NSWLR 323 (CA) at 333

> It should not be fashioned by the courts for application to particular commercial litigation."

5. The conduct which might permit a court to depart from 'the usual order' must be conduct in the litigation and/or the circumstances leading up to the litigation.[12] McHugh J in Oshlack explained what he meant by reference to examples. He referred to situations:

> "… when the successful party by its lax conduct effectively invites the litigation … ;
> unnecessarily protracts the proceedings … ;
> succeeds on a point not argued before a lower court … ;
> prosecutes the matter solely for the purpose of increasing the costs recoverable … ; or
> obtains relief which the unsuccessful party had already offered in settlement of the dispute …"

6. There are recognised situations or special circumstances[13] where the courts have departed from the usual order, including:
   (a) the making of an allegation, known to be false, that the opposite party is guilty of fraud;[14]
   (b) the making of an irrelevant allegation of fraud;[15]
   (c) conduct which causes loss of time to the court and to other parties;[16]
   (d) the commencement or continuation of proceedings for an ulterior motive;[17]

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12 Oshlack v Richmond River Council (1998) 193 CLR 72 at 97 per McHugh J
13 Conveniently gathered together by Harper J in Ugly Tribe Co Pty Ltd v Sikola & Ors [2001] VSC 189 (unrep. 14 June 2001)
14 Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd (1988) 81 ALR 397
15 Thors v Weekes (1989) 92 ALR 131
16 Tetijo Holdings Pty Ltd v Keeprite Australia Pty Ltd (unreported, Federal Court, French J, 3 May 1991)

(e) conduct amounting to contempt of court;[18]

(f) the commencement of continuation of proceedings in wilful disregard of known facts or clearly established law;[19] or

(g) the failure until after the commencement of the trial to discover documents the time of discovery of which would have considerably shortened, or avoided, the trial.[20]

7. These categories are not closed but, unlike in the U.K., the manner in which a party approached negotiations has not been expressly recognised in Australia as a cost-affecting factor. However practitioners are warned that the authorities should not be read "in an endeavour to establish a set of inflexible guidelines which should thereafter be determinative of the manner in which the Court's discretion is to be exercised [for this] would be to fetter the Court's discretion".[21]

The Approach to Negotiations

8. The manner in which the parties approach negotiations may obviously affect the outcome. We have all seen cases where one party is so confident of its entitlements that it refuses to even consider the possibility of an outcome other than 100% success. In such circumstances it is always the task of the practitioner for the other side to encourage the making of an offer as high as the client could possibly bear, confident in the knowledge that the offer will be rejected out of hand and will then stand the offeror in good stead in the event of the plaintiff failing on some aspect of its claim. Most cases are not like this, in my experience. In most cases both parties recognize that they have claims or defences some

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17 Ragata Developments Pty Ltd v Westpac Banking Corp (unreported, Federal Court, Davies J, 5 March 1993)

18 EMI Records Ltd v Ian Cameron Wallace Ltd [1983] Ch 59

19 J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WA) Branch (No 2) (1993) 46 IR 301

20 National Australia Bank v Petit-Breuilh (No 2) (unreported, [1999] VSC 395, Balmford J 18 October 1999)

21 National Australia Bank v Petit-Breuilh (No 2) (supra)

of which are stronger or weaker than others; they recognize that the judicial system does not provide a perfect outcome and that the effort of running lengthy litigation can divert an organisation from its real commercial task.

9. There is no bright line which can determine how a mediation can be successfully run. Many cases involve claims and counterclaims which can be expressed in money. ADR can encourage a compromise between the parties, both of whom may be reluctant to agree, which allows them to go forward, possibly preserving an ongoing commercial relationship, and providing a framework for their future relations without the necessity for legal intervention. So there can be no single answer to the question why a mediation or negotiation failed. However where one party puts forward an offer it is rarely a final position. For the other party to reject the offer out of hand, with no counter-offer, places the original offeror in a difficult position. Should it make a further offer higher than the first (which it was always wiling to make) to see that will entice the other party to enter into the negotiation or should it walk away, fearing that any other course will be regarded as weakness.

Who is the successful party?

10. Generally the successful party is the party in whose favour the net flow of money is ordered by the court. However measuring success purely in financial terms may be ineffective at giving effect to important policy considerations which the courts should be considering. These should include whether the successful party might well have done better by adopting a more flexible approach to its negotiations with its opponent.

What as a matter of policy should courts be trying to encourage

11. The general practice of awarding party-party costs, which the profession and the courts recognise compel the recipient to meet an ever-increasing proportion of its costs, notwithstanding its success, is said to be adopted

to act as 'an important spur to settlement'.[22] The cost on society of providing sufficient courts, judges and judicial administration staff and facilities is immense. 'Having one's day in court' might in many instances be considered a luxury. French J in J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers — W.A. Branch[23] considered the wider implications to the community and highlighted the pressures on the court system, the serious delays and the escalating legal costs. At 3–4 he said:

> "… the demands of the community for greater economy and efficiency in the conduct of litigation may have to be reflected in a softening of the presumption that a successful party is entitled to all its costs. I agree with the observation of Wilcox J in Commissioner of Australian Federal Police v Razzi[24] where his Honour said after referring to the importance of the general principle:
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> > 'But I do not think that courts should be reluctant to recognise the existence of exceptional cases. In these days of extensive court delays and high legal costs the courts should use all proper means to encourage parties to consider carefully what matters they will put in issue in their litigation. If parties come to realise that they will not necessarily recover the whole of their costs, even though they have unsuccessfully raised a discrete issue, they are likely better to consider whether the raising of that issue is a justifiable course to take.' "

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22 Per Handley JA in Cachia v Hanes (1991) 23 NSWLR 304 at 318

23 (Fed Court, 19 February 1993, unreported)

24 (1991) 101 ALR 425 at 430

The U.K. Approach

12. Overseas, in the U.K., recent changes to the Civil Procedure Rules have widened the principles on which the discretion as to costs is to be exercised. The rules as to offers are set out in Part 36 and O.44 sets out the costs rules:

The general provisions as to costs are at Rule 44.3.

> *(1) The court has discretion as to --*
>
> *(a) whether costs are payable by one party to another;*
>
> *(b) the amount of those costs; and*
>
> *(c) when they are to be paid.*
>
> *(2) If the court decides to make an order about costs*
>
> *(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but*
>
> *(b) the court may make a different order*
>
> *(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including*
>
> *(a) the conduct of all the parties …*
>
> *(5) The conduct of the parties includes --*
>
> *(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;*
>
> *(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
>
> *(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and*
>
> *(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.*

13. The relevant U.K. rules as to offers are contained in CPR Part 36, particularly 36.10, 36.11 and 36.14, rules amended in April 2007. The costs consequences following judgment are set out in CPR 36.14 as follows:

> *(1) This Rule applies where upon judgment being entered –*
>
> *(a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or*
>
> *(b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.*
>
> *(2) Subject to paragraph (6), where Rule 36.14(1)(a) applies, the court will, unless it considers it unjust to do so, order that the defendant is entitled to –*
>
> *(a) his costs from the date on which the relevant period expired; and*
>
> *(b) interest on those costs.*
>
> *(3) Subject to paragraph (6), where Rule 36.14(1)(b) applies, the court will, unless it considers it unjust to do so, order that the claimant is entitled to –*
>
> *(a) interest on the whole or part of any sum of money (excluding interest) awarded at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;*
>
> *(b) his costs on the indemnity basis from the date on which the relevant period expired and*
>
> *(c) interest on those costs at a rate not exceeding 10% above base rate.*

> *(4) In considering whether it would be unjust to make the orders referred to in paragraph (2) and (3) above, the court will take into account all the circumstances of the case including –*
>
> *(a) the terms of any Part 36 offer;*
>
> *(b) the stage in the proceedings when any Part 36 offer was made including in particular how long before the trial started the offer was made;*
>
> *(c) the information available to the parties at the time when the Part 36 offer was made; and*
>
> *(d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling an offer to be made or evaluated.*
>
> *...*
>
> *(6) Paragraphs (2) and (3) of this Rule do not apply to a Part 36 offer –*
>
> *(a) that has been withdrawn;*
>
> *(b) that has been changed so that its terms are less advantageous to the offeree, and the offeree has beaten the less advantageous offer;*
>
> *(c) made less than 21 days before the trial, unless the court has abridged the relevant period.*

14. In Lisa v *Carver*[25] Counsel for the respondent submitted that the change in the rules had to give rise to a change in judicial approach. Judicial discretion, it was submitted, was now expanded to take into account more than just a strict financial comparison of the offer and the judgment. By the judgment the claimant had exceeded the defendant's part 36 offer, but only by a small amount. The judge deplored the claimant's failure to negotiate after receiving that offer. The judge noted that the claimant in

[25] Carver v BAA [2008] EWCA Civ 412 at paragraph 26

practice gained nothing from pressing on with the action, because of the irrecoverable costs which she incurred. The judge ordered the claimant to pay the defendant's costs in respect of the period after the part 36 offer

15. The approach of the trial judge was challenged in the Court of Appeal. According to Ward L.J. in Lisa v Carver, Lady Justice Smith's judgment in Hall & ors v Stone [2007] EWCA Civ. 1354 correctly expressed an example of the non-financial issues relevant to the exercise of discretion where she observed in paragraph 82:

> "... In these days where both sides are expected to conduct themselves in a reasonable way and to seek agreement where possible, it may be right to penalise a party to some degree for failing to accept a reasonable offer or for failing to come back with a counter offer."

16. Ward L.J., with whose judgment the remaining judges concurred, stated:

> "1. The issue in this appeal boils down quite simply to this: if a claimant beats a payment of money into court by a modest amount, even £1, has she obtained a judgment more advantageous than the defendant's Part 36 offer or is the Court entitled to look at all the circumstances of the case in deciding where the balance of advantage lies? His Honour Judge Knight QC sitting in the Central London County Court on 4th June 2007 took the latter, broad view and so he ordered the claimant to pay the defendant's costs of the claim after the time for accepting the payment had expired. He also made no order for costs for the prior period covered by an earlier Calderbank offer. The claimant now appeals

…

30. Are the concepts of bettering a Part 36 payment and obtaining a judgment more advantageous than the Part 36 offer synonymous? Posed in that way, perhaps they are. But in the context of the new Part 36, where money claims and non-money claims are to be treated in the same way, "more advantageous" is, as Rix L.J. observed in the course of argument, "an open-textured" phrase. It permits a more wide-ranging review of all the facts and circumstances of the case in deciding whether the judgment, which is the fruit of the litigation, was worth the fight.

31. The answer must, in my judgment, take account of the modern approach to litigation. The Civil Procedure Rules, and Part 36 in particular, encourage both sides to make offers to settle. Compromise is seen as an object worthy of promotion for compromise is better than contest, both for the litigants concerned, for the court and for the administration of justice as a whole. Litigation is time consuming and it comes at a cost, emotional as well as financial. Those are, therefore, appropriate factors to take into account in deciding whether the battle was worth it. Money is not the sole governing criterion.

…

35. The November 2005 offer was relevant and it was a reasonable, not a derisory one. It met with no response. It met with no counter-offer. The claim was pursued and, albeit through no fault of the claimant herself, it became an exaggerated claim and she must, alas, bear ultimate

> responsibility for the manner in which her claim was conducted on her behalf by the different professionals advising her. Her exaggerated claim was withdrawn late in the day. Still no counter-proposals were forthcoming. The events of 25th May bordered on the farcical with offer and counter-offer, withdrawal of offer and purported acceptance of an offer which was not even on the table. This was a small claim in which the defendants admitted liability within months of the accident. To have incurred about £80,000 in costs to contest a claim under £5,000 fills one with despair. In all those circumstances Judge Knight was fully justified in marking his displeasure by making no order for costs."

The Court of Appeal was endorsing a marked change from the situation which had prevailed prior to April 2007.

17. In Morgan v UPS[26], the English Court of Appeal was faced with another appeal in personal injury case. This was not a case where a plaintiff fought at trial a hopelessly exaggerated claim or failed to negotiate. Pill L.J. outlined with the principles upon which the discretion as to costs should be exercised, and explained certain authorities:

> "15. In Painting[27], to which Mr Tudor-Evans has referred, this court disturbed the trial judge's findings on costs in a personal injury case in which about £400,000 had been claimed and a payment of £184,000 paid into court and not accepted. Only £10,000 remained in court[28]. In the

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26 [2008] EWCA Civ 1476

27 Painting v The University of Oxford [2005] EWCA Civ 161

28 The Defendant had obtained further video evidence of the Plaintiff and made a successful application for all but $10,000 to be repaid to it before the trial.

event the sum of £25,331.78 was awarded. Maurice Kay LJ stated at paragraph 21:

"The two-day hearing of the trial was concerned overwhelmingly with the issue of exaggeration, and [the defendant] won on that issue".

The defendant was "in real terms the winner". The judge stated that there was "a strong likelihood" that, but for the claimant's exaggeration, the claim "would have been settled at an early stage and with modest costs." At no stage did the claimant show any willingness to negotiate or put forward a counterproposal. Maurice Kay LJ stated:

"It must not be assumed that beating a Part 36 payment is conclusive. It is a factor and will often be conclusive, but one has to have regard to all the circumstances of the case."

16. Agreeing with Maurice Kay LJ, Longmore LJ underlined that the exaggeration of the claimant [Painting] was intentional and also underlined her failure to make any attempt to negotiate."[29]

18. At the conclusion of the Wembley Stadium case involving Multiplex and Cleveland Bridge[30], Jackson J. (as he then was) had cause to consider carefully the manner in which the judicial discretion as to costs should be exercised. He gave a comprehensive and thoughtful analysis of the authorities and the policy considerations which he took into account in exercising his discretion as to the costs. At para 72, having reviewed several decisions handed down since the enactment of the 1986 Civil

29 Morgan v UPS [2008] EWCA Civ 1476

30 Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2008] EWHC 2280 (TCC)

Procedure Rules his Lordship identified eight principles which he concluded should be considered in making an order for costs. These included:

> "(i) In commercial litigation where each party has claims and asserts that a balance is owing in its own favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.
>
> …
>
> (vi) In considering the circumstances of the case the judge will have regard not only to any part 36 offers [offers of compromise] made but also to each party's approach to negotiations (insofar as admissible) and general conduct of the litigation.
>
> (vii) If
>
> (a) one party makes an order offer under part 36 or an admissible offer within rule 44.3(4)(c) which is nearly but not quite sufficient, and
>
> (b) the other party rejects that offer outright without any attempt to negotiate,
>
> then it might be appropriate to penalise the second party in costs."

19. Jackson J had dealt with complex claims and counterclaims in the Wembley Stadium Case. Multiplex succeeded in obtaining a net judgment in excess of $6m: it was the successful party. The defendant had never offered to pay that sum, or anything like it. Prima facie Multiplex should have its costs. However the trial judge did not exercise his discretion as to costs by simplistically ordering Cleveland Bridge to pay the costs of Multiplex. The case had been fought over four distinct areas of dispute, reflected in money claims in four schedules. Jackson J analysed carefully how the burden of costs should be distributed as follows:

"77. The next question which I must consider is what departures are required from that starting point, having regard to all the circumstances of the case.

78. Two important factors which require consideration at this stage are as follows: first, Multiplex's case on Scott Schedule 4 was comprehensively defeated; secondly, Multiplex failed by a wide margin to beat CB's offer of 14 December 2007 in relation to Scott Schedule 1. In my view, CB's success and Multiplex's lack of success on these matters must be reflected in the costs order.

79. It is therefore necessary to consider what costs are attributable to each element of the case. Over the last few days the solicitors on both sides have furnished to me a great deal of costs information from their records. I have also had the advantage of managing this litigation for the last three years. Drawing upon the recent information from the solicitors, as well as my own experience of the case, I consider that the following is a reasonable apportionment of the costs which have been incurred: schedule 1, 10 per cent; schedule 2, 30 per cent; schedule 4, 40 per cent; common costs, 20 per cent. The principal discrepancy between the costs information supplied by solicitors concerned schedule 4. It appears that CB devoted a rather higher percentage of costs to schedule 4 than did Multiplex. I take 40 per cent as a reasonable average figure.

80. I must next consider whether the circumstances of this case require an issues-based costs order. Having regard to rule 44.3(7) and the guidance given by the Court of Appeal in the authorities cited above, I conclude that the circumstances of this case do not require an issues-based costs order. It is

perfectly practicable to make a proportionate costs order which will do justice between the parties.

81. Let me now consider what proportion of their costs Multiplex should receive. In relation to schedule 1 Multiplex had a claim for defects on which they recovered damages of £151,305.39 plus interest. CB made no offer in respect of schedule 1 until December 2007. On 14 December 2007 CB offered £500,000. That was not an offer made under part 36, but it was an admissible offer within rule 44.3(4)(c). That offer remained open for 21 days. Multiplex ought to have accepted that offer. Multiplex acted unreasonably in rejecting it.

82. According to the information supplied to me by solicitors, CB incurred 50 per cent of their costs referable to schedule 1 before 21 December 2007 and the other 50 per cent subsequently. Multiplex are not able to be quite so precise. However, it appears that Multiplex incurred about 40 per cent of their schedule 1 costs before 21 December 2007 and about 60 per cent after that date.

83. In making my preliminary assessment I shall pencil in a nil recovery for Multiplex in respect of the 10 per cent costs attributable to schedule 1.

84. I now come to schedule 2 and the common costs. 50 per cent of the costs of the action are either attributable to schedule 2 or are common costs. Since Multiplex are the winners of schedule 2 and Multiplex are the winners of the action, I shall pencil in that Multiplex recovers all of those costs.

85. Mr Williamson makes the point that although Multiplex are the victors in respect of schedule 2, they lost a large number of schedule 2 points along the way.

86. There are in my view two answers to that submission. First, I am treating CB as the victors in respect of schedule 4, even though CB lost quite a few schedule 4 issues along the way: See chapters 29, 30 and 33 of the main judgment. Secondly, *Multiplex made it clear in March 2008 that schedule 2 involved a range of issues, some of which they were likely to lose. Multiplex were perfectly willing to compromise schedule 2 on a basis similar to the eventual judgment of this court. CB acted unreasonably in refusing to enter into any form of dialogue about schedule 2*.

87. I now come to schedule 4. Even though Multiplex won a number of individual issues along the way, the overall result of schedule 4 was that Multiplex recovered nothing other than nominal damages. I shall therefore pencil in that the costs order should allow CB to recover the costs referable to schedule 4, namely 40 per cent of the costs of the action.

88. If the figures which I have so far pencilled in are applied mechanistically, the overall result is that Multiplex recover about 10 per cent of the costs of the action. However, I must not stop at this point. I must now look at the entirety of the parties' conduct since June 2006 and consider whether any adjustment is required to that 10 per cent figure.

89. For the reasons set out in part 2 above, the conduct of both parties is open to criticism. Nevertheless, I have come to the conclusion that the greater share of blame rests with CB. I reach this conclusion for the following reason. Having conceded on 6 June 2006 that some overall payment was due to Multiplex, CB never followed up that concession by making an offer. At no point between 6 June 2006 and today, the day of judgment, have CB ever offered to make any payment in settlement of the entire proceedings.

> *90. I consider that this failure on the part of CB is the overriding reason why this litigation has not settled. There is a heavier onus on the debtor to make a defendant's offer than there is on the creditor to make a claimant's offer. The manner in which Multiplex pursued schedule 4 is a matter for criticism, but it is less culpable than CB's obstinate refusal to make any offer of settlement.*
>
> *91. In respect of the period December 2007 to March 2008 both parties at different times threw away golden opportunities to achieve favourable settlement. I consider that Multiplex are more to blame than CB during that period.*
>
> 92. Taking into account the conduct of the parties and all the circumstances of the case, I shall increase the initial figure of 10 per cent in favour of Multiplex to 20 per cent. In the result, therefore, CB must pay to Multiplex 20 per cent of the costs of the action."
>
> [Emphasis in italics added]

Australian Authorities

20. No Australian decision has been identified which clearly reveals that discretion as to costs was exercised against a successful party on the grounds of an unreasonable negotiating approach.[31] The negotiating stance adopted by the Plaintiff was unsuccessfully claimed to justify a departure from the order sought by the successful Plaintiff in Howell v Fiorenza.[32] However the rejection of the Defendant's application was not on the basis that an unreasonable negotiating stance could not justify an adverse costs order but rather that, in the circumstances of the case, the

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31 Indeed a submission that any enquiry as to the parties' negotiating approach should be conducted in relation to the exercise of judicial discretion as to costs was expressly rejected by Byrne J in Aquatec-Maxcon Pty Ltd v Barwon (No 8) [2007] VSC 363 at [36]

32 [2008] NSWSC 709 (unrep. Hall J 16 July 2008)

allegation of unreasonable conduct was not established. Courts have expressed the view that the approach to litigation as a whole, such as raising a plethora of issues and causing excessive time and delay, can be taken into account in depriving a successful party of its costs.[33] Judicial discretion as to costs is said to be unfettered.

21. However I would urge that all jurisdictions give consideration as to whether changes to court rules are required to more clearly permit issues such as the unreasonable approach to settlement and unreasonable conduct which is likely to have brought ADR to an unsuccessful conclusion should properly to taken into account when the issue of costs is considered, notwithstanding the success of the party against whom the discretion is sought to be exercised.

22. Of course care would need to be taken to limit the evidence in relation to the negotiations. Byrne J's concerns in Aquatec-Maxcon[34] need to be addressed. It would rarely be advantageous to either party to have viva voce contested evidence. The adjudicating court should be entitled to call for an agreed summary of relevant correspondence or an agreed chronology of such negotiations.

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33 Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (No 2) [2008] FCAFC 107

34 Aquatec-Maxcon Pty Ltd v Barwon (No 8) [2007] VSC 363 at [36]

Abstract of Paper:

Court rules across Australia reflect that a party rejecting a proposed settlement offer bears little risk of an adverse costs order unless the offer exceeds the judgment or award ultimately obtained. Is this a sensible approach? Should the rules be redrafted more constructively to encourage and support the adoption of a sensible negotiating position? Should a high-handed rejection of a low but not obviously unreasonable offer which stymies further ADR endeavours put the rejecting party at risk of losing all or part of the costs even if it does ultimately obtain more than the offer?