CASE notes

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Offers to settle: how final is 'final'?

Jones v Percal & Co (No 2) (Plaint 136/97, McGill DCJ, 10.08.99, unreported)

There was a time when lawyers could predict with confidence the implications that an offer to settle would have vis-a-vis the recovery of costs. Since 1 January 1996 however, the Queensland legislature has attempted to dictate the circumstances in which litigants involved in work-related personal injury matters may recoup costs, those circumstances being dependant upon the making of a 'final' offer to settle.

This article will consider the effect of the decision in *Jones v Percal & Co* (No 2) (Plaint 136/97, McGill DCJ, 10.08.99, unreported) on a party's ability to recover costs under the *Workers' Compensation Act 1990* (Qld), as amended by the *Workers' Compensation Amendment Act (No 2) 1995* (Qld). Relevant provisions under the WorkCover Queensland Act 1996 (Qld) and new *Uniform Civil Procedure Rules 1999* (Qld) will also be briefly considered.

Section 182C of the *Workers' Compensation Act 1990*, as amended ("the 1990 Act") applies to non-certificate injuries (ie. injuries resulting in less than 20% bodily impairment) sustained between 01.01.96 and 31.01.97 and relevantly provides:

(3) No order as to costs, other than an order allowed under this section, is to be made by the court in the proceeding, unless the Board certifies that the worker's injury is a serious injury.

(4) If a party to the proceeding makes an offer of settlement that is refused and the court later awards damages to the worker, the court must, in the following circumstances, make the order about costs provided for -

(a) if the amount of damages awarded is equal to or more than the worker's final offer - an order that the defendant pay the worker's party and party costs from the day of the final offer;

(b) if the amount of damages awarded is equal to or less than the defendant's final offer - an order that the worker pay the defendant's party and party costs from the day of the final offer.

(5) If the award of damages is less than the worker's final offer, but above the defendant's final offer subsection (3) applies.

The issue in *Percal's* case was whether a particular offer of settlement, in order to be valid for the purpose of s.182C, must be characterised AT THE TIME WHEN IT IS MADE as 'final' (either expressly or by necessary implication).

The facts in *Percal's* case were that the Plaintiff sustained personal injury on 22 August 1996 during the course of his employment. The Plaintiff was not entitled to or rejected a lump sum compensation and the Board had not certified his injury as 'serious' (ie. more than 20% bodily impairment). On 1 July 1998 the Plaintiff made a formal offer (ie. expressly in accordance with Part 9 of the *District Court Rules*) to settle the claim for $160,000.00. The offer was not expressed to be 'final'. On 7 July 1998 the Plaintiff's solicitors wrote to the Defendant's solicitors in the following terms: "We would appreciate it if you would advise if you are amiable to discussions in relation to settling this matter." On 23 July 1999 judgement was given by McGill DCJ for the Plaintiff in the sum of $218,601.00. The question of costs was reserved.

On hearing submissions as to costs, the Plaintiff argued that he was entitled to his party and party costs from the date of his offer. The Defendant argued that the Plaintiff's offer was not a 'final offer' within the meaning of s.182C. The court was referred to the decision in *Bishoff v Lyh Australia Pty Ltd* (Plt 198/97, Forno DCJ, 19.03.99, unreported) where it was held that "if an offer is to be made under ss. (4) of s.182C then it should clearly be made as a final offer and the circumstances should be such as to indicate that that is so." In *Bishoff's* case, the Plaintiff's offer to settle, made on 4 November 1998, was not expressed to be final; additionally, Forno DCJ was satisfied that in the circumstances there was no reason (from the Defendant's perspective) to expect that no further offer would be made. Thus despite giving judgement in favour of the Plaintiff and awarding damages in excess of the 04.11.98 offer (*in fact* the Plaintiff's final offer), his Honour made no order as to costs.

Relying on the decision in *Bishoff*, Counsel for the Defendant in *Percal's* case argued that the Plaintiff's offer of 1 July 1998 was not final because (a) it was not expressly stated to be final; and (b) the surrounding circumstances did not necessarily imply that it was final (ie. the Plaintiff had subsequently indicated a willingness to negotiate in his solicitor's letter of 7 July 1998). It was argued therefore that the Defendant had not been made aware that the offer was relevant for the purposes of s.182C and

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was thereby *deprived* of the opportunity to assess its situation in light thereof.

In his reasons for judgement McGill DCJ noted the following difficulties arising from this interpretation of the term "final offer" in s.182C:

(i) the operation of sub-section (4) is conditioned on making "*an* offer of settlement" suggesting that any offer can become final in the absence of a later offer; and

(ii) the situation in which a party makes more than one 'final' offer is not adequately addressed: indeed, the court is given no guidance whatsoever as to how it ought to determine which is the relevant final offer for the purpose of sub-section (4).

As a result, McGill DCJ ultimately preferred to adopt a retrospective interpretation of the term 'final offer', ie. that an offer will necessarily acquire finality in the absence of a subsequent offer. It was noted that, as sub-section (4) will only become operative after the court awards damages, it will always be possible (with the benefit of hindsight) to determine which offer was in fact a party's last; and this promotes certainty in the application of the provision.

One important consequence of preferring a retrospective interpretation of this provision is that parties continue to be encouraged (or at least not discouraged) to try to settle matters without the necessity of proceeding to trial. The prospective meaning, on the other hand, would inevitably result in parties assuming a position vis-a-vis settlement which is 'set in stone'. That is because on the latter construction a litigant's best chance of recovering any costs would be contingent on the making of a single expressly final offer and sticking to it. As McGill DCJ stated (at 8), "I would be reluctant to adopt an interpretation of [a provision] which positively encouraged parties to adopt a fixed position and never budge".

From a practical perspective, the provision will operate more efficiently and effectively under the retrospective interpretation because every offer will be potentially relevant at the time when it is made. Thus litigants will be forced to take all offers seriously and carefully assess the prospects of their case in light of the potential cost implications of s.182C. McGill DCJ considered this alternative to be preferable to one where "an offer could apparently be disregarded as of no significance... unless it was described as a 'final offer'." Similarly, parties would not be left speculating upon receipt of an offer as to whether finality could be implied from the immediate circumstances or, worse still, electing not to continue negotiations for fear of jeopardising their recovery of costs.

From a policy perspective, it is perhaps unfortunate that the interpretation of the term 'final offer' adopted by McGill DCJ in Percal's case has been superseded by the *WorkCover Queensland Act 1996* ("the 1996 Act") which applies to work-related injuries sustained on or after 1 February 1997. Whilst the wording of s. 325 of the 1996 Act (the provision equivalent to s.182C) remains substantively the same, the recovery of costs has been made substantially more difficult by the introduction of s. 294. Section 294 compels litigants to immediately exchange "written final offers" where a matter fails to settle at the compulsory conference, which must be held prior to the filing of proceedings. If not accepted, the written final offers are then placed in sealed envelopes and filed with the court. Under s.294(6) the court must have regard to the parties' final offers when making its decision as to costs (and in relation to non-certificate injuries that decision is dictated by s.325). Thus the legislature appears to have succeeded in its quest to severely hinder the amicable compromise of litigation: each party's opportunity to recover costs is expressly restricted to the making of one written final offer.

In stark contrast the *Uniform Civil Procedure Rules 1999* ("the *UCPR*") appear to promote the resolution of matters by providing for advantageous costs consequences to flow from the making of formal offers to settle. The possibility of multiple offers is specifically addressed although with differing consequences depending on which party made the offers.

Rule 360 provides that where a plaintiff obtains a judgement that is "no less favourable to the plaintiff" than the plaintiff's offer, then the plaintiff is prima facie entitled to recover indemnity (ie. solicitor/own client) costs for the whole of the action. Where the plaintiff has made more than one offer to settle the "offer *most* favourable to the plaintiff" is the only relevant offer for the purpose of this rule. Although the term 'most favourable' is not defined it seems apparent from the context (ie. costs consequences flowing from offers) that it is likely to be interpreted with reference to recouping (maximum) costs.

Rule 361 provides that where a plaintiff obtains a judgement that is "not more favourable to the plaintiff" than the defendant's offer, then the defendant is prima facie entitled to recover standard (ie. party and party) costs from the day after its offer was served. Where the defendant has made more than one offer to settle (each of which the plaintiff has failed to better at trial) then the defendant's costs are recoverable from the date of the *first* such offer. Thus a defendant will not be precluded from recovering its costs from the date of its earliest (relevant) offer; and thereby is at least not discouraged from continuing to attempt to settle litigation by making formal offers to settle.

The correlation in policy between the new *UCPR* and the decision of McGill DCJ in *Percal's* case is clear: both are concerned to encourage the settlement of litigation and both recognise that permitting the recovery of costs is the most effective means to this end. Conversely, the provisions of the *WorkCover Queensland Act 1996* operate to positively impede attempts to resolve litigation by limiting parties to one final offer and providing for restrictive cost consequences to flow therefrom.

Thus the retrospective interpretation of s.182C of the *Workers' Compensation Act 1990* (as amended) adopted by McGill DCJ in *Percal's* case could be considered to be the lesser of two evils: although it provides little incentive for a party to continue with attempts to resolve litigation (by limiting the recovery of costs with reference to the date of the last offer), at least where a party does continue to make offers to settle the *possibility* of recouping some of its costs is preserved. PL