

LEGAL BITES UPDATE 18 JUNE 2007**1. ALTERNATIVE DISPUTE RESOLUTION – COMPULSORY REFERRAL TO MEDIATION.**

What if one party opposes the referral? What approach should the court take?

See *Dimento v Dimento* [2007] NSWSC 420, Brereton J.

- the question of whether proceedings should be referred involves a weighing of the costs and procedural consequences which might be incurred, the costs that might be avoided by a successful mediation and the availability of alternative means to progress negotiations between the parties.
- If mediation is to take place it is important that it take place on a “level playing field.”
- The court must take into account that a party opposes the referral and take account of that party’s reasons.
- The evidence in this case does not show any refusal to negotiate on the part of the opposing party and that party has stated that it is willing to consider mediation once affidavit material has been filed and a hearing date obtained.
- Referral refused.

2. APPLICATION TO VACATE HEARING DATE ON FIRST DAY OF HEARING

See *Reliance Financial Services Pty Ltd v Sobbi* [2007] NSWSC 424, Price J.

- Defendant applied to vacate.
- Had not properly prepared for the hearing.
- Court has to decide application under s.58 of the *Civil Procedure Act 2005*.
- The Court must act in accordance with the dictates of justice.
- The interests of justice include taking account of the interests of the other party.
- The Court must also pay regard to sections 56 and 57 of the CPA.
- In this case the consequences of delay to the plaintiff can be compensated for, if the plaintiff is successful, by the payment of interest.
- Application allowed.

3. INDEMNITY COSTS – OFFER BY CALDERBANK LETTER, NOT UNDER THE COURT RULES

Where offer was not and could not have been made as formal offer under the Rules.

- See *Hali Retail Stores Pty Ltd v Hafaz* [2007] NSWSC 427, Brereton J.



- See (NSW) Supreme Court Rules 1970, Pt 51A, r 22(6) UCPR 2005, Pt 20, r 26.
- Indemnity costs applied for on basis of an offer made by the plaintiffs solicitors to defendant's solicitors by way of letter marked "without prejudice save as to costs" and stating it as made in accordance with the principles in *Calderbank v Calderbank* [1976] Fam 93.
- Because the offer was made by letter, and not in accordance with the UCPR 2005, Pt 20 r 26, there is no starting position prescribed by the rules in favour of a particular costs outcome.
- The UCPR changed the old position under Supreme Court Rules and its District Court equivalent, so that where a defendant's offer is not accepted and the plaintiff obtains a judgement no more favourable than the offer, the defendant is entitled to an order for costs assessed on the indemnity basis from the *day after the offer was made*. That change undermines the continued application of *Leichhardt Municipal Council v Green*.
- That change does not alter the present position that the present offer not having been made in accordance with the Rules, the prima facie consequence provided by the Rules does not apply.

4. MOTION FOR COSTS WHERE NO DETERMINATION MADE ON THE MERITS

See *Gray v Sirtex Medical Ltd* [2007] NSWSC 476, Barrett J.

- Hill J, in *ASC v Aust-Home Investments Ltd* (1993) 44 FCR 194 summarised the key principles to be applied.
 - i. Where neither party desires to proceed with litigation the court should be ready to facilitate the conclusion of the proceedings by making a costs order;
 - ii. It will rarely, if ever, be appropriate, where there has been no trial on the merits, for a court to try and determine for itself the case on the merits (in a hypothetical manner);
 - iii. It would be appropriate for a court to determine whether the applicant acted reasonably in commencing the proceedings and whether the respondent acted reasonably in defending them.
 - iv. In a particular case it might be appropriate for the court in its discretion to consider the conduct of a respondent prior to the commencement of the proceedings where such conduct may have precipitated the litigation.
 - v. Where the proceedings terminate after interlocutory relief has been granted, the Court may take into account the fact that interlocutory relief has been granted.
- See also per McHugh J in *Re the Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia* (197) 186 CLR 622.
- These principles apply to an application for costs under the UCPR 42.19.