

RECENT DECISIONS

Challenges to Indemnity Costs Orders in the Dust Diseases Tribunal

Piatti v ACN 000 246 542 Pty Ltd & Anor (No. 2) [2019] NSWDDT 8 (6 September 2019)

[Link to decision](#)

Summary

This case considers the instances in which an indemnity cost order can be challenged pursuant to Clause 90 of the *Dust Diseases Tribunal Regulation*.

Background

A Statement of Claim was filed by the plaintiff against Granosite Pty Ltd as the first defendant and Amaca Pty Ltd as the second defendant for damages, including past and future "lost years" damages under section 15B of the *Civil Liability Act*. Upon the original plaintiff's death the current plaintiff was substituted to represent the estate of the original plaintiff.

At trial, Counsel for the second defendant made submissions that, for legal reasons (including that section 15B damages did not survive for the benefit of the estate), damages should not be awarded, or in the alternative, should be awarded under limited conditions. On 23 August 2019, judgment was entered for the plaintiff against the first and second defendants for the sum of \$1,057,748.84 with an order that the defendants pay the plaintiff's costs. Leave was granted for parties to seek alternative cost orders.

The plaintiff subsequently sought an indemnity costs order from 3 July 2019 on the basis of an Offer of Compromise served on 3 July 2019 in which the plaintiff offered to accept judgment in the sum of \$1,050,000.

Clause 90 of *Dust Diseases Tribunal Regulation* mandates that a plaintiff is entitled to an indemnity costs order unless the Tribunal orders otherwise in an exceptional case or for the avoidance of substantial injustice. Both defendants opposed the application for an indemnity costs order.

Decision

The plaintiff served an affidavit evidence in support of the s 15B claim on 26 July 2019 after serving the Offer of Compromise. Counsel for the second defendant submitted that the plaintiff's claim was substantially reliant on this evidence, which led to a material change in the plaintiff's case. The late service of the evidence in this circumstance prejudiced the second defendant, triggering an exceptional circumstance.

The Tribunal held that the late service of evidence could not constitute an exceptional circumstance where the defendants were disputing the plaintiff's entitlement to section 15B damages. The service of evidence prior to the Offer of Compromise would not have made a substantial difference to the way the offer was considered in this circumstance. The Tribunal reasoned that there would be a strong argument that a case was one of exceptional circumstance if the issue was the assessment of damages, not entitlement, and the plaintiff's success depended on evidence served after the expiry of an Offer of Compromise.

Counsel for the first defendant argued that the Offer of Compromise did not involve a genuine compromise, as the offer was a mere \$7,748.84 less than the judgment

amount. The Tribunal rejected this submission noting the plaintiff had significantly compromised on the conditions upon which damages were to be assessed. Furthermore, clause 90 required the plaintiff to achieve a result of “no less favourable”, and not one that was “substantially better”. The plaintiff had achieved this.

The Tribunal ordered that the costs payable by the defendants to the plaintiff were to be assessed on an indemnity basis after 3 July 2019.

Implications

The instances in which a defendant can argue against an indemnity costs order are limited. A defendant is required to show that a material change in a plaintiff’s case occurring after the expiry of an Offer of Compromise would have caused a substantially different consideration of the offer, and has now resulted in substantial injustice.

Furthermore, the Tribunal confirmed that the plaintiff is not required to substantially beat an offer for an entitlement for an indemnity cost order to arise. A plaintiff’s compromise does not have to be in the form of a monetary compromise, but can be a genuine compromise on the conditions on which their claim is made.

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