

## Update On Indemnity Costs Orders

Roland Everingham, NSW

The grant of indemnity costs orders sometimes turn upon the precise wording of the offer of compromise. In Associated Confectionary (Aust) Ltd. v. Mineral and Chemical Traders Pty. Ltd. (1991) 25 NSWLR 349 Giles J. held that an offer of compromise expressed to be inclusive of costs was ineffective for the purpose of any indemnity costs order. He came to that conclusion for a number of reasons but substantially on the view that it would be impossible to sever that part of the inclusive offer which related to costs. It would involve the Court in quite complex investigations as to what amount should be for costs and it would require a determination of that part of the offer which related to the verdict and a comparison of this amount with the verdict given by the Court.

On 29 July 1994 Donovan AJ. dealt with an offer of compromise which was silent as to costs in Montgomery v. GIO (unreported) 29 July 1994 New South Wales Supreme Court. The Defendant urged his Honour to adopt the reasoning of Giles J. and hold that the form of offer was ineffective for the purpose of indemnity costs. One of the difficulties which arose was the problem of the formation of any contract if the Defendant accepted the offer of compromise which was silent as to costs. Giles J. in Associated Confectionary seemed to suggest that such an offer without reference to costs as an extra item would be ineffective but Donovan AJ. viewed the comments of Giles J. as obiter as Giles J. did not have to decide the issue on the facts before him.

The relevant phrasing of Part 22 Rule 21 at the time when the offer was made in Montgomery's case was "in any proceeding, the Plaintiff or the Defendant may make an offer to compromise any claim in the proceedings on the terms specified in the "Notice of Offer". Donovan AJ. said that the rules seemed to be directed to a claim in the proceedings and said "if that interpretation is correct, it seems to me that a notice which is

silent as to costs is nevertheless a notice which deals with the "claim in the proceedings" and such notice is, "an offer to compromise", "a claim in the proceedings".

In Giles J. specifically referred to Part 52 Rule 17 which provided that if a Notice of Offer contained a term which purported to negative or limit the operation of sub rule 1, then the term should be of no effect. Donovan AJ. held that in Montgomery's case there was no term which purported to negative or limit Rule 17(1).

Donovan AJ. then examined whether there was an implied term in the offer to the effect that the offer was plus costs. He examined the particular facts in Montgomery's case and noted that the Plaintiff was a person whose estate was under the Protected Estates Act and that in those circumstances it was the universal practice that offers be made exclusive of costs. Accordingly he took the view that such a practice supported a conclusion that the offer of compromise would contain an implied term that the offer was plus costs. His Honour then went on to examine whether in the circumstances of the case indemnity costs order should be made and subsequently so ordered.

---

## Association of Trial Lawyers of America Convention 1995

Last year a number of APLA members attended the ATLA Annual convention, and all those who attended were extremely impressed with the quality of the sessions and the services ATLA offers. APLA also hosted a successful **APLA Dowunder party**, attended by senior representatives from ATLA, which was an invaluable opportunity for Australian lawyers to meet lawyers from jurisdictions around the world.

Next years ATLA Convention will be held in New York at the New York Hilton & Towers, from July 15 to July 19. I will circulate ATLA conference programs and registration forms early next year. If you are interested in further information about ATLA please contact the APLA office on (02) 262 6960.