

Xue v Karimbla Properties (No.45) Pty Ltd (No 2) [2023] NSWSC 795

Background

Xue (**the plaintiffs**) were the purchasers of an off-the-plan apartment from members of the Meriton Group of companies (**the defendants**) who alleged they were misled by the defendants, prior to settlement, regarding the availability of vendor finance at the market interest rate, resulting in non-completion of the contract for sale.

The plaintiffs subsequently commenced proceedings in the Supreme Court of New South Wales seeking the return of a \$87,300 deposit and unspecified damages (the latter of which were not sought at the Hearing) occasioned by alleged misleading or deceptive conduct on the part of the defendants in contravention of section 18 of the Australian Consumer Law or section 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth).

On 7 February 2022 (two weeks after an unsuccessful Court-ordered mediation), the defendants served a *Calderbank* offer on the plaintiffs seeking a discontinuance of the proceedings with no order as to costs and setting out comprehensive reasons as to why the plaintiffs' case would fail (**the Offer**). The Offer was not accepted by the plaintiffs.

On 25 May 2023, his Honour entered judgment dismissing the plaintiffs' claim and ordering that the plaintiffs pay the defendants' costs on an ordinary basis unless a party sought a different costs order within 14 days.

The defendants made an application for indemnity costs from 8 February 2022 on the basis of the Offer and the plaintiffs were directed to file and serve written submissions and any affidavit(s) in response to that application, but failed to do so.

The plaintiffs' solicitors subsequently wrote to his Honour advising that the plaintiffs disagreed with the application, that they had filed a notice of intention to appeal and that they wished for the costs application to be considered following the result of the appeal. However, his Honour notified the plaintiffs' solicitors that the application would be dealt with in accordance with previous directions and that the filing of the notice of intention to appeal did not warrant a deferral of the determination of the issue of costs at first instance.

The Law

His Honour was required to consider the principals applicable to the making of an order for costs under the *Civil Procedure Act 2005* (NSW) (**the CPA**) and the *Uniform Civil Procedure Rules 2005* (NSW) (**the UCPR**), as well as whether a 'walk away offer' represented a genuine compromise.

Conclusion

His Honour confirmed that a 'walk away offer' of the kind relied on by the defendants was capable of engaging the principles in *Calderbank*, provided the offer involved a significant element of compromise, such as the waiving of objectively substantial costs incurred.

There was no evidence of the actual costs incurred by the defendants at the time the Offer was made, however, the defendants' written submissions during the hearing referred to an approximate amount of \$20,000 while the plaintiffs had separately resolved part of their claim against one of the member defendants for \$55,000 (inclusive of costs).

Considered in that context, His Honour was satisfied that the Offer involved a real and genuine element of compromise on the part of the defendants and was not made simply as an invitation to capitulate or to trigger costs sanctions. His Honour further held the prospects of success of the plaintiffs' case were raised by the defendants in the Offer and noted that these were not dissimilar to the issues with the plaintiffs' case that were referred to in the primary judgment such that the legal and factual questions for determination were sufficiently certain at the time the Offer was made for the plaintiffs to have undertaken a reasonable assessment and identified the weaknesses of their case.

Taking these factors into account, His Honour determined that it was unreasonable for the plaintiffs to have declined to accept the Offer and ordered that the plaintiffs pay the defendants' costs of the proceedings on an ordinary basis up to 7 February 2022 and on an indemnity basis from 8 February 2022.

Lessons Learned

- The Court holds a broad discretion as to costs, including to what extent they should be awarded and whether they are to be awarded on an ordinary or indemnity basis.
- Walk away offers are capable of engaging the *Calderbank* principles, provided they involve a significant element of compromise, such as objectively substantial costs incurred.

Contact:

Andrew Gulyas | Senior Associate

D: +61 (2) 9376 1122

E: andrew.gulyas@hbcrawford.com.au

Shaye Clarke | Paralegal

D: +61 (2) 4044 4108

E: shaye.clarke@hbcrawford.com.au

Visit www.hbalegal.com for more case articles and industry news.

Disclaimer: This article is intended for informational purposes only and should not be construed as legal advice. For any legal advice please contact us.