Federal Court of Australia

McFarlane as Trustee for the S McFarlane Superannuation Fund v Insignia Financial Ltd (No 2) [2024] FCA 356

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| File number: | NSD 206 of 2020 |
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| Judgment of: | **ANDERSON J** |
|  |  |
| Date of judgment: | 11 April 2024 |
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| Catchwords: | **COSTS** – offer of compromise sent by respondent under r 25 of the *Federal Court Rules 2011*(Cth) – where the applicant’s originating application was dismissed – application by respondent for indemnity costs following rejection of offer of compromise – whether the applicant unreasonably failed to accept the offer – where the applicant’s rejection of the offer of compromise was not unreasonable in the circumstances – application for indemnity costs dismissed |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth)  *Federal Court Rules 2011* (Cth) |
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| Cases cited: | *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd* [2020] FCA 598  *Anchorage Capital Partners Pty Limited v ACPA Pty Ltd* (2018) 259 FCR 514  *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd (No 4)* [2009] FCA 803  *Calderbank v Calderbank* [1975] ALL ER 333  *Equity 8 Pty Ltd v Shaw Stockbroking Ltd* [2007] NSWSC 503  *Gretton v Commonwealth* [2007] NSWSC 149  *Karpik v Carnival PLC (The Ruby Princess) (Common Questions and Costs)* [2024] FCA 57  *McFarlane as Trustee for the S McFarlane Superannuation Fund v Insignia Financial Ltd* [2023] FCA 1628  *Rakman International Pty Limited v Boss Fire & Safety Pty Ltd* [2023] FCAFC 202  *Seven Network Limited v News Limited* [2007] FCA 1489; 244 ALR 374  *State Street Global Advisors Trust Company v Maurice Blackburn Pty Ltd (No 3)* [2021] FCA 568; 159 IPR 281  *Tregidga v Pasma Holdings Pty Limited (No 2)* [2021] FCA 1439 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Number of paragraphs: | 30 |
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| Counsel for the Respondent: | Mr B Holmes |
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| Solicitor for the Respondent: | King & Wood Mallesons |

ORDERS

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|  | | NSD 206 of 2020 |
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| BETWEEN: | JOHN DOUGLAS MCFARLANE ATF THE S MCFARLANE SUPERANNUATION FUND  Applicant | |
| AND: | INSIGNIA FINANCIAL LTD  Respondent | |

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| order made by: | ANDERSON J |
| DATE OF ORDER: | 11 April 2024 |

THE COURT ORDERS THAT:

1. The Applicant pay the Respondent’s costs of the proceeding on a party-party basis, as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ANDERSON J:

# INTRODUCTION

1. On 20 December 2023, I delivered judgment in this proceeding. In my reasons for judgment, I dismissed all of the applicant’s (**Mr McFarlane**) claims and I ordered Mr McFarlane to pay the respondent’s (**Insignia**) costs: *McFarlane as Trustee for the S McFarlane Superannuation Fund v Insignia Financial Ltd* [2023] FCA 1628 (**Reasons**). At the time of delivering judgment, counsel for Insignia foreshadowed an intention to seek an indemnity costs order against Mr McFarlane. I subsequently directed each of the parties to file written submissions outlining their position with respect to this issue. I note that the defined terms in this judgment have the same meaning as in the primary judgment.
2. Insignia filed its written submissions on 16 February 2024. Insignia’s written submissions were supported by an affidavit of Benjamin George Thomas Kiely, sworn on 15 February 2024 (**Kiely Affidavit**). Insignia also filed its written submissions in reply on 1 March 2024.
3. Mr McFarlane filed written submissions on 23 February 2024. The submissions were supported by an affidavit of Craig Richard Allsopp, sworn on 23 February 2024 (**Allsopp Affidavit**).
4. Insignia submits that it is entitled to indemnity costs following an offer it made on 12 May 2023, pursuant to r 25.01 of the *Federal Court Rules 2011* (Cth) (**Rules**). The offer of compromise of 12 May 2023 was an offer to settle the proceeding by paying Mr McFarlane $6 million AUD, inclusive of costs and interest. Mr McFarlane rejected the offer. Insignia submits that Mr McFarlane’s rejection of the offer of compromise was unreasonable and that indemnity costs should therefore be ordered, pursuant to r 25.14(2). An order of indemnity costs against Mr McFarlane would result in Mr McFarlane paying Insignia’s costs before 11am on 16 May 2023 on a party-party basis (about which there is no dispute), and after 11am on 16 May 2023 on an indemnity basis: r 25.14(2). In the alternative, Insignia seek the same orders on the basis of the principles in *Calderbank v Calderbank* [1975] ALL ER 333 (***Calderbank***)

# Principles

1. Section 43 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) empowers this Court with a broad discretion to make orders with respect to costs. The ordinary rule that costs be awarded on a party-party basis may be displaced in favour of an award on an indemnity basis if either:
   1. there has been an unreasonable rejection of an informal offer to settle; or
   2. a formal offer is made under r 25.01 and the applicable requirements of that order are satisfied: r 25.14(2).
2. In either case, the relevant matters which a court will consider are essentially the same.
3. The first matter is whether there was a genuine offer of compromise in the context of the proceeding. In *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd (No 4)* [2009] FCA 803 (***Brookfield***), Finkelstein J at [13] summarised the relevant position, where his Honour stated that even a low offer, or a “walk away” offer can amount to a genuine offer:

One can easily envisage circumstances where a “walk away” offer must be regarded as a genuine offer of compromise. Take for example a case that has progressed for some time and the parties’ costs are quite high. In that event an offer to walk away may, in a business sense, be a significant offer: see for example *Commissioner of Taxation v Evenfont (No 2)* (2009) 223 FLR 28 at [31].

1. The finding made by Finkelstein J in *Brookfield* was referred to with approval by the Full Court of the Federal Court of Australia in *Rakman International Pty Limited v Boss Fire & Safety Pty Ltd* [2023] FCAFC 202 (***Rakman***) at [160] – [161].
2. Furthermore, a low offer may be more likely to amount to a genuine offer of compromise if it is put on the basis that the claims have no reasonable prospect of success: see, e.g., *Tregidga v Pasma Holdings Pty Limited (No 2)* [2021] FCA 1439 (***Tregidga***) at [17].
3. The second matter is whether non-acceptance of the offer was unreasonable when viewed in light of the circumstances existing at the time the offer was rejected. This is the key issue and the question which matters most is whether, given the information then available, the offeree should have known that the case was likely to fail: *Rakman* at [155]; *State Street Global Advisors Trust Company v Maurice Blackburn Pty Ltd (No 3)* [2021] FCA 568; 159 IPR 281 (***State Street***), per Beach J at [38], affirmed on appeal ([2022] FCAFC 57 at [126]); *Anchorage Capital Partners Pty Limited v ACPA Pty Ltd* (2018) 259 FCR 514 (***Anchorage***), per Nicholas, Yates and Beach JJ at [239].
4. The Court will therefore take into account the stage of the proceeding at which the offer was received, whether discovery was made and the evidence filed, and whether the offeror provided a reasoned explanation of the weakness of the offeree’s case: *State Street* at [40]-[46] and *Anchorage* at [7].
5. These principles apply to all proceedings including representative proceedings: *Karpik v Carnival PLC (The Ruby Princess) (Common Questions and Costs)* [2024] FCA 57 at [14] – [21].
6. Once it is shown that the applicant unreasonably failed to accept the offer, there is a presumption that an indemnity costs order will be made, subject to the residual discretion to make an order inconsistent with the Rules pursuant to r 1.35: *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd* [2020] FCA 598 at [57].

# Insignia’s submissions

1. Insignia submits that, pursuant to r 25.14(2) of the Rules, it is entitled to indemnity costs because Mr McFarlane’s decision not to accept the offer of compromise was unreasonable. Insignia submits that this rejection was unreasonable because Mr McFarlane and the funder had the requisite information available to them, at the time of the offer, such that they ought to have known that the case was likely to fail: *Rakman* at [155]. Insignia submits that the offer was sent at an advanced stage of the proceeding, and Insignia set out, in clear terms, the weaknesses in Mr McFarlane’s case such that it should have been readily apparent that Mr McFarlane’s claims were likely to fail. The fact that all the claims were dismissed for reasons including those forecast in Insignia’s offer lends further support to the conclusion that costs ought to be paid on an indemnity basis.
2. Insignia submits that the offer of $6 million AUD (inclusive of costs and interest) was a genuine offer of compromise in a proceeding which had no reasonable prospects of success.
3. Insignia submits that the failure to accept the offer was unreasonable in circumstances where it was made at an advanced stage of the proceedings, effectively on the eve of the trial. By this time, Insignia had given extensive discovery, all of the lay and expert evidence had been filed and an unsuccessful mediation had occurred. Insignia submits that in these circumstances, the significant flaws in Mr McFarlane’s case which ultimately led to his claim being dismissed entirely, must have been readily apparent to the applicant.
4. Insignia relies upon the fact that Mr McFarlane, during opening submissions at the trial, abandoned his allegations of insider trading and front running (as a form of insider trading). Insignia submits that it follows that, three weeks earlier when the offer was made, Mr McFarlane must have appreciated the weaknesses in these claims. In addition, the Court held that Mr McFarlane failed to establish, or did not press, the truth of a number of the most prominent components of the alleged corporate misconduct: Reasons at [622].
5. Insignia, in its offer, explained that even if Mr McFarlane established some of the allegations of corporate misconduct, the Court would conclude that the information relied upon was not material price-sensitive information and that this was precisely what the Court found: Reasons at [630].
6. Insignia, in its offer, pointed out that Mr McFarlane’s expert evidence on materiality did not support his pleaded case. Mr McFarlane abandoned any reliance upon his experts report at trial, with the consequence that he had no evidence of objective materiality, and in particular, no evidence to establish that any of the alleged information, if true, would have affected Insignia’s reputation in the manner that was material to its share price: Reasons at [628].
7. Insignia, in its offer, pointed out that Mr McFarlane’s evidence on causation and loss was flawed. Insignia submits that these deficiencies ought to have been readily apparent to Mr McFarlane and that, in the end, the Court held that Mr McFarlane’s expert evidence by way of an event study was invalid to prove causation: Reasons at [668] – [669].

# Consideration

1. For the reasons that follow, I am not satisfied that Mr McFarlane unreasonably failed to accept Insignia’s offer of compromise in May 2023.
2. Mr McFarlane commenced this proceeding in February 2020. Insignia’s offer was made less that one month before the trial commenced on 5 June 2023. By that time, both parties had incurred substantial costs in bringing the matter to hearing, including costs for discovery. The evidence discloses that, by the time of Insignia’s offer in May 2023:
3. Mr McFarlane’s costs were approximately $6.1 million AUD (Allsopp Affidavit at [7]); and
4. Mr McFarlane’s estimate of his and the group members’ total losses calculated by reference to Mr Houston’s expert evidence about the amount of inflation in the price of Insignia’s shares during the Relevant Period, was approximately $67 million to $110 million AUD (Allsopp Affidavit at [12]).
5. Whilst the estimated loss is based upon Mr Allsopp’s subjective view, which has not been tested, an assessment of whether it was unreasonable for Mr McFarlane to reject the offer, is an objective test and is based on all of the surrounding circumstances.
6. Insignia’s offer to settle the entirety of the claims for $6 million AUD (inclusive of costs and interest) put a negligible value on the claims.
7. Whilst the claims were ultimately dismissed, the question of reasonableness is assessed “**prospectively** at the time the offer was made”: *Seven Network Limited v News Limited* [2007] FCA 1489 at 389; 244 ALR 374 at [65]; *Gretton v Commonwealth* [2007] NSWSC 149 at [24], per Studdert J; *Equity 8 Pty Ltd v Shaw Stockbroking Ltd* [2007] NSWSC 503 at [33], per Barrett J.
8. In my view, in May 2023, it was not unreasonable for Mr McFarlane to have formed the view that there were real prospects that the Court could conclude that both Insignia was aware of the pleaded Alleged Material Information and that the information was material to Insignia’s share price. Ultimately, I was satisfied that Insignia was aware of a large amount of the Alleged Material Information: Reasons at [552] – [563] and [675]. I also accepted the evidence of Mr Houston, whom Mr McFarlane engaged as an expert witness to opine upon the importance of a company’s reputation with respect to company share price (Reasons at [628]), but I was not satisfied about the materiality of that known information (Reasons at [629]).
9. In May 2023, Mr McFarlane knew that Insignia had not filed any lay evidence. Insofar as Mr McFarlane was concerned, Insignia would not be calling any lay witnesses to explain its conduct in all the circumstances. Whilst I rejected Mr McFarlane’s submissions about the *Jones v Dunkel* inferences I should draw as a consequence of Insignia not calling any lay evidence, this was an issue that was indeed contestable.
10. I am not satisfied that, as at May 2023, Mr McFarlane ought to have been of the considered opinion that his claim was bound to fail. Nor should Mr McFarlane be taken to have held the considered opinion that the Court would have been of the opinion that it was unreasonable for Mr McFarlane not to have accepted Insignia’s offer in May 2023 in the context of a settlement approval application pursuant to s 33V(1) of the FCA Act, had such an application been brought.
11. Whilst accepting Insignia’s offer would have avoided Mr McFarlane incurring his own costs of the trial and Insignia’s costs of trial, which must come about as the losing party, the result to Mr McFarlane and the group members is that they would have gained nothing from the litigation had the offer for compromise been accepted. Mr McFarlane’s claim, objectively assessed as at May 2023, was not, in my opinion, so hopeless as to warrant a conclusion that by refusing to accept Insignia’s offer, he acted unreasonably such that he should be liable to pay indemnity costs.
12. For these reasons, I reject Insignia’s application for an order for indemnity costs pursuant to r 25, and in the alternative, under the principles of *Calderbank*. Mr McFarlane will pay Insignia’s costs on a party-party basis as agreed or assessed.

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| I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Anderson. |

Associate:

Dated: 11 April 2024