Preti v Conservation Land Corporation and Ors [2007] NTSC 34

PARTIES:	NATALE PRETI v CONSERVATION LAND CORPORATION And: SAHARA TOURS PTY LTD (ACN 050 989 216) And: PARKS AND WILDLIFE COMMISSION
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	5 of 2002 (20200969)
DELIVERED:	15 May 2007
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JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

PROCEDURE – Costs – offer of compromise – offer more favourable than judgment – form of offer – currency of settlement

Hillier v Sheather (1995) 36 NSWLR 414; *Shellharbour City Council v Johnson (No 2)* [2006] NSWCA 114; *Simonovski v Bendigo Bank Ltd (No 2)* [2003] VSC 139, cited

White v Director of Housing 203 VSC 124, distinguished

REPRESENTATION:

Counsel:

Plaintiff:	R Meldrum QC
First, Second and Third Defendants:	J Kelly

Solicitors:

Plaintiff:	Morgan Buckley
First, Second and Third Defendants:	Povey Stirk

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Preti v Conservation Land Corporation and Ors [2007] NTSC 34
No 5 of 2002 (20200969)

BETWEEN:

NATALE PRETI
Plaintiff

AND:

CONSERVATION LAND CORPORATION
First Defendant

AND:

SAHARA TOURS PTY LTD (ACN 050 989 216)
Second Defendant

AND:

PARKS AND WILDLIFE COMMISSION
Third Defendant

CORAM: SOUTHWOOD J

REASONS FOR DECISION

(Delivered 15 May 2007)

Introduction

[1] On 20 April 2007 I delivered my reasons for judgment in this proceeding. The plaintiff was unsuccessful against the first defendant but successful against the second and third defendants. The plaintiff was awarded damages in the sum of CH 186,136 against the second and third defendants. After I

delivered my reasons for judgment the matter was adjourned to 8 May 2007 to enable the parties to obtain instructions and prepare their submissions as to which party should bear the costs of the proceeding.

[2] On 2 May 2007 the defendants filed a summons seeking the following orders:

1. The plaintiff is to pay the first defendant's costs of the proceeding.

2. The second and third defendants are to pay the plaintiff's costs incurred prior to 10 October 2005 as agreed or, in default, as taxed.

3. The plaintiff is to pay the second and third defendants' costs incurred on and after 10 October 2005 as agreed or, in default, as taxed.

4. The execution of the payment of the judgment sum is stayed until costs have been agreed or taxed.

5. On completion of the taxation, the plaintiff's solicitors are to pay the sums held in their trust account as security for costs to the defendants pursuant to the orders made by this court.

[3] The plaintiff asked the court to make an order that the defendants pay the plaintiff's costs of the proceeding on the ground that costs should follow the event.

[4] The parties' applications for costs were heard by the court on 8 May 2007. The defendants' application for orders four and five in their summons filed 2 May 2007 was not argued pending the court's determination of the applications for costs. The defendants were given leave to re-list the summons on short notice if the defendants were successful as to costs and

the parties were not able to agree on appropriate orders in those circumstances.

[5] On 10 May 2007 I made the following orders as to costs:

1. The plaintiff is to pay the first defendant's costs of the proceeding.

2. The second and third defendants are to pay the plaintiff's costs of the proceeding incurred prior to 12 October 2005 as agreed or, in default, taxed.

3. In addition the second and third defendants are to pay the following costs of the plaintiff:

   (a) The costs of attendances, if any, by counsel, solicitors or clerks to arrange for the video conferencing of the evidence of Dr Jean Maeder, Gregory Preti and Melissa Preti.

   (b) The plaintiff's costs thrown away, including disbursements thrown away, by reason of the late cancellation of the video conferencing of the evidence of Dr Jean Maeder, Gregory Preti and Melissa Preti.

   (c) The plaintiff's costs of any additional attendances, appearances, drafting of correspondence and perusing of correspondence that were incurred by the plaintiff in order to obtain the discovery and production of the correspondence between Mr Greg Campbell and the Regional Manager of the third defendant, the

risk management strategy adopted by the third defendant in 1996 and the diary entries. Such costs are not to include the ordinary costs of attending to peruse the defendants' discovered documents.

4. The plaintiff is to pay the second and third defendants' costs incurred on and after 12 October 2005 as agreed or, in default, as taxed. The second and third defendants are not entitled to and shall not have their costs of:

    (a) Requesting that Dr Jean Maeder, Gregory Preti and Melissa Preti be made available for cross-examination and advising the plaintiff's solicitors that Dr Jean Maeder, Gregory Preti and Melissa Preti would not be required for cross examination.

    (b) Responding to the plaintiff's requests for discovery and production of the correspondence between Mr Greg Campbell and the Regional Manager of the third defendant, the risk management strategy adopted by the third defendant in 1996 and the diary entries made by the staff of the third defendant at Ormiston Gorge.

[6] When I made the above costs orders I advised the parties that I would deliver written Reasons for Decision. Following are my reasons for decision as to the costs orders that I made on 10 May 2007.

The facts

[7] In support of their application for orders that the plaintiff pay the first defendant's costs of the proceeding and the second and third defendants' costs of the proceeding from 12 October 2005 the defendants read the affidavits of the following deponents: Geoffrey John Stirk sworn on 1 May 2007 and 8 May 2007, Gregory John MacDonald sworn on 3 May 2007 and Robert William McCormack sworn on 3 May 2007. In support of his application for an order that the defendants pay the plaintiff's costs of the proceeding the plaintiff read two affidavits of Anthony Ross Whitelum both sworn on 4 May 2007.

[8] The affidavits establish the following facts that are relevant to the question of costs.

[9] On 10 October 2005 the defendants filed an offer to compromise under Order 26 of the Supreme Court Rules which offered to compromise the plaintiff's claims against the defendants for the sum of $200,000 plus costs as agreed, or in the absence of agreement, as taxed. The offer of compromise was served on Mr Whitelum, the solicitor for the plaintiff, on 12 October 2005. The plaintiff did not accept the offer of compromise.

[10] In par three of one of his affidavits sworn on 4 May 2007, Mr Whitelum asserts that after 12 October 2005 he informed the solicitors for the defendants that as a matter of law any settlement should be in Swiss francs. He does not depose to the date when he so informed the solicitors for the

defendants nor does he depose that he asked for an extension of time in which to respond to the offer of compromise filed on 10 October 2005. He does not depose that he had any difficulty taking instructions in relation to the offer of compromise dated 10 October 2005, nor does he depose that he could not determine how many Swiss francs the amount of $200,000 would have purchased, nor does he depose that in October 2005 he was concerned about fluctuations in the exchange rate.

[11] On 12 October 2005 or there about, Mr Whitelum sent a letter to Mr Stirk. In the letter he stated:

> We confirm we have been served with the defendant's offer to settle dated 10 October and that it was received on that day.
>
> As you are aware, two of the claimants are minors. Therefore, any compromise in relation to them must be approved by the court. In doing so, the court is obviously aware of the nature of the claims made by all claimants and their entitlements. Indeed counsel would have to approve the compromise in any documentation submitted to the court.
>
> In those circumstances, we ask that you provide us your assessment of how the offer of $200,000 plus costs is calculated including any component for contributory negligence.
>
> In our submission, the claimants are unable to be properly advised as to the offer until such time as we are aware of how it is assessed and provide appropriate advice, particularly to the guardian of the minors.
>
> We await your response.

[12] On 1 November 2005 Mr Whitelum sent a letter to Mr Stirk. In it he stated:

> We refer to our letter of 12 October last in relation to the defendants' offer.

> We write to advise that the writer and Sally Gearin will be travelling to Switzerland in December to obtain full and detailed instructions from the claimants as regards your filed offer. Without knowing the components of your offer, it will be very difficult for us to obtain instructions particularly given the complication with at least one of the children being a minor when/if this matter settles.
>
> We await your early response.

[13] On 4 November 2005, Mr Whitelum sent a letter to Ms Presbury at Hunt and Hunt. In the letter Mr Whitelum stated:

> We refer to our previous correspondence.
>
> Please find enclosed for your consideration and comment copies of our letters of 12 October 2005 and 1 November 2005 to Povey Stirk in relation to the defendants combined offer.

[14] None of the letters makes any mention about a requirement that the offer of compromise dated 10 October 2005 should be in Swiss francs. In the circumstances I do not accept Mr Whitelum's assertion that after 12 October 2005 and before the later offers of compromise were made by the defendants he informed the solicitors for the defendants that as a matter of law any settlement should be in Swiss francs. I find that he is mistaken in this regard. In so doing I make no criticism of him whatsoever.

[15] On 2 June 2006 Hunt and Hunt, who were at that time the solicitors for the second defendant, filed an offer to compromise under Order 26 of the Supreme Court Rules which offered to compromise the plaintiff's claims against the defendants for the sums of $450,000 plus costs as agreed, or in the absence of agreement, as taxed. The plaintiff did not accept the offer of compromise. On 4 July 2006 the plaintiff filed an offer of compromise

under Order 26 of the Supreme Court Rules offering to compromise the plaintiff's claims against the defendants for the sum of CHF 575,000. The plaintiff's offer of compromise was consistent with his formulated claim dated 4 July 2006. The offer of compromise was not accepted by the defendants. On 19 July 2006 the defendants filed an offer to compromise under Order 26 of the Supreme Court Rules which offered to compromise the plaintiff's claims against the defendants for the sums of $500,000 plus costs as agreed, or in the absence of agreement, as taxed. The plaintiff did not accept the offer of compromise.

[16] On 5 June 2006 Mr Whitelum sent a letter to the solicitors for the defendants. The letter was in the following terms:

> We refer to your letter of 2nd instant enclosing the defendant's combined Offer of Compromise and to this morning's telephone discussion.
>
> We confirm that the plaintiff's request an extension of time to 4 July 2006 in which to accept the Offer on the basis that:
>
> 1. As previously advised, Senior Counsel, senior/junior Counsel and instructing solicitor are unable to meet until 27thJune 2006.
>
> 2. The plaintiff's formulation as ordered by the Court is now not due to be filed until 4 July 2006.
>
> 3. The Offer of Compromise should properly be made in Swiss francs.
>
> Should you not accede to this request, it will be an extremely expensive exercise for Counsel and instructing solicitor to meet prior to the expiration of the Offer of Compromise pursuant to the Rules.
>
> We await your response.

[17] On 6 June 2006 Mr Whitelum sent a facsimile to the solicitors for the defendants. In the letter he stated inter alia:

> We refer to our letters in relation to this issue.
>
> We have now discussed with Counsel the issue of the extension of time to accept your offer. We are advised to put the following additional matters in support of the request for extension:
>
> 1. The Preti family is divided into two groups. We have previously made submissions to Justice Southwood in relation to the family dynamics, particularly when making submissions in relation to your client's claim for the costs of the stay application. To iterate, Natale, Philomena, Vivianna and Fabio form one group and have differing interests to the other group consisting of Silvia Preti and her children. Instructions need to be taken separately.
>
> 2. It is necessary to arrange an interpreter for Natale and his family group.
>
> 3. The offer is not broken down into heads of damages for each of the claimants. As you are aware there is one infant involved. That requires special consideration. Pursuant to the Supreme Court Rules any acceptance by a party under disability is not binding until the Court has approved the compromise.
>
> 4. The offer should be made in Swiss francs being the currency of the venue from where the losses emanate.
>
> 5. All claimants reside in Switzerland and there are logistical difficulties with arranging suitable conference times.
>
> Accordingly, we ask that your client reconsider the issue of the extension of time and the additional issue of serving an Offer of Compromise in accordance with the Supreme Court Rules.
>
> Should it be necessary we will rely on the correspondence exchanged on this issue as to the question of costs.

[18] Upon receipt of the defendants' offer of compromise dated 19 July 2006 Mr Whitelum informed Mr Stirk that, as the offer of compromise was made

in Australian dollars, he was concerned about advising the plaintiff to accept the offer because of the uncertainty of currency fluctuations and the expense of currency conversion. At no stage was any evidence tendered by the plaintiff about the cost of currency conversion.

[19] On 5 September 2006 Mr Whitelum sent an email to the solicitors for the defendants. In the email he stated:

> If the issue of the power of the court to award damages in Swiss francs is in issue the plaintiff's rely upon *Mazzoni v Boyne Smelters Ltd* 1998 1 QD R 76 BC 9507175 and *Brown Boveri (Aust) Pty Ltd v Baltic Shipping Co* 93 ALR 171.

[20] At all times as expressed in their solicitors correspondence in reply, the attitude of the defendants was that no extension of time in which to consider the offers of compromise would be granted to the plaintiff by the defendants, the offers of compromise would remain in Australian dollars, it was a matter for the solicitors for the plaintiff to advise the plaintiff about exchange rates and the costs of conversion to Swiss francs, the break up of the amount offered to compromise the proceeding was a matter for the plaintiff and those on behalf of whom he claimed and the defendants were not closing the door to further negotiation and would consider any counter offer made by the plaintiff.

[21] At all material times each of the defendants was willing and able to pay the amount stated in each offer of compromise plus any costs and disbursements of the plaintiff, whether agreed or taxed.

[22] The Reserve Bank of Australia exchange rates for Australia dollars and Swiss franks as at the date of each offer and as at the date of judgment are as follows:

Daily Exchange Rates of the Australian Dollar

Daily 4PM	**Swiss Franc CHF**
10/10/2005	0.9696
12/10/2005	0.9714
02/06/2006	0.9108
4/07/2006	0.9109
19/07/2006	0.9344
20/04/2007	1.0056

[23] The above table shows a variation in the exchange rate between the Australian dollar and the Swiss franc over the period between 10 October 2005 and 20 April 2007 of 0.9014 to 1.0056. The variation in the exchange rate is potentially significant. However, over the periods: from 12 October 2005 to 28 November 2005; from 2 June 2006 to 24 July 2006; and from 19 July 2007 to 7 September 2006; the variations in the exchange rate between the Australian dollar and the Swiss franc were respectively between: 0.9480 and .9723; 0.9014 and 0.9350; and 0.9309 and 0.9507.

[24] As at 12 October 2005, $200,000 would have purchased CHF 194,280, less the cost of conversion, which amount is greater than the judgment sum of CHF 186,136. It was conceded by Mr Meldrum QC that the costs of

conversion would not have reduced the amount of Swiss francs that could be purchased with $200,000 below CHF 186,136. As at 20 April 2007 the sum of CHF 186,136 would have purchased $185,099.44 at the then existing exchange rate. If the exchange rate that existed on 12 October 2005 is used CHF 186,136 would purchase $191,616.22.

[25] Between 22 November 2004 and 29 August 2006 the plaintiff's solicitors in their correspondence with the solicitors for the defendants were seeking discovery and production of the following documents: documents relating to the erection, maintenance and content of any signs at Ellery Creek Big Hole; documents relating to the erection or maintenance of the interpretive shelter; documents relating to the improvement of the signage at Ellery Creek Big Hole; documents relating to the third defendant's safety policy and minutes of meetings of the third defendant's Safety Committee; documents, if any, about the relationship between the second defendant and the third defendant; the incident report in relation to the death of the deceased; the safety review of park facilities for minimising risk; the notes made by the employee of the third defendant after 18 January 1999 when the sign in the interpretive shelter was removed; the statement of Peter Hill obtained by Graham Willoughby; documents relating to the Tour Operator Licensing and Training Project; the correspondence between Mr Greg Campbell and the Regional Manager of the third defendant; the Risk Management Strategy that was prepared and adopted by the third defendant in 1996; diary entries

made by the staff of the third defendant at Ormiston Gorge; and various other documents.

[26] The issue of discovery was also raised by the solicitors for the plaintiff at various other times including: before a settlement conference on 10 October 2005; before the court on 16 and 23 November 2005, 30 January 2006, 10 March 2006 and 3 April 2006; and in a telephone conversation between Mr Whitelum and Mr Stirk on 26 June 2006.

[27] As at 23 and 24 August 2006 the plaintiff was still pressing for production of all of the diary entries made at Ormiston Gorge, the Risk Management Strategy that was prepared and adopted by the third defendant in 1996, the correspondence between Mr Greg Campbell and the Regional Manager of the third defendant and various other documents. The diary entries made at Ormiston Gorge by the staff of the third defendant, the Risk Management Strategy that was prepared and adopted by the third defendant in 1996 and the correspondence between Mr Greg Campbell and the Regional Manager of the third defendant were all tendered as evidence at the trial as they were relevant to the plaintiff's claim against the third defendant.

[28] On 12 May 2006 the solicitors for the second defendant sent a letter to the solicitors for the plaintiff. In the letter Mr Hutton stated that the second defendant required all of the plaintiff's witnesses to be available for cross-examination.

[29] Melissa Preti and Gregory Preti were organised by the solicitors for the plaintiff to give evidence on 28 August 2006. On the morning of that day, counsel for the defendants advised that they would not be required for cross examination. The video facility had been booked for four hours and three hours of that time were thrown away or not used. Likewise Dr Maeder was required for cross examination until very late in the proceeding.

The submissions of the defendants

[30] Ms Kelly, who appeared on behalf of the defendants, made the following submissions.

[31] The first defendant was wholly successful and is entitled to its costs. Senior Counsel for the plaintiff told the court during his opening that the plaintiff would not be proceeding against the first defendant. The plaintiff's claim against the first defendant was dismissed on 24 August 2006. It was not reasonable to join the first defendant to the proceeding. The plaintiff sued the wrong party. A Bullock order is inappropriate.

[32] Under r 26.08(3) of the Supreme Court Rules the second and third defendants are entitled to their costs from 12 October 2005. On that date, the defendants served on the solicitors for the plaintiff an offer of compromise that was more favourable than the amount of damages that the court awarded the plaintiff. No issue was taken with the statement of Mr Whitelum that he received the offer of compromise "on or about 12 October 2005".

[33] The offer of compromise was for the sum of $200,000 plus costs as agreed or taxed. Had the offer of compromise been accepted on 12 October 2005, it would have purchased CHF 194, 280. On the day the offer expired, on 26 October 2005, it would have purchased CHF 193,120. There were only minor daily fluctuations in the exchange rate between the Australian dollar and the Swiss franc. At no time during the 14 days that the offer of compromised filed on 10 October 2005 remained open was the offer worth less than the Judgment awarded to the plaintiff by the court, let alone the judgment adjusted for interest as required by r 26.08(5) of the Supreme Court Rules. The judgment sum is CHF 186,136. The judgment sum adjusted to exclude interest after 12 October 2005 is CHF 178,524.

[34] Rule 26.08 (3) of the Supreme Court Rules states:

> Where an offer of compromise is made by a defendant and not accepted by the plaintiff and the plaintiff obtains a judgment on the claim to which the offer relates not more favourable to him than the terms of the offer, then, unless the Court otherwise orders, the plaintiff shall be entitled to an order against the defendant for the plaintiff's costs in respect of the claim up to and including the day the offer was served taxed on the standard basis and the defendant shall be entitled to an order against the plaintiff for the defendant's costs in respect of the claim after the offer of compromise taxed on the standard basis.

[35] The costs consequences in r 26.08(3) of the Supreme Court Rules attach to the first offer made which turns out to be higher than the judgment sum. Once an offer of compromise is made by the defendants, the plaintiff has a limited time to decide whether to accept it or not. Thereafter, the parties were litigating at a risk that, if the plaintiff obtained a judgment not more

favourable than the terms of the offer of compromise, the defendants would be entitled to a costs order against the plaintiff for their costs from the day following the offer. The operation of the rule crystallises at the moment the offer is rejected or lapses: *Hillier v Sheather* (1995) 36 NSWLR 414 at 419 -420 per Kirby P (as he then was). His Honour went on to state at 420:

> Once an offer is made which turns out to be higher than the judgment recovered, prima facie the rule applies. On the theory of the rule, the litigation after that offer (which, ex post, is shown to have been a reasonable one) has been occasioned by the refusal or failure of the plaintiff to accept the offer. That is why, exempting order apart, the plaintiff must bear the costs from that time.

[36] After discussing the expedients which have been adopted by the courts to deal with the large increase of cases, Kirby P said, in *Hillier v Sheather* (supra) at 420-421:

> For those cases which remain within the court system, rules designed to shift the burden of party and party costs (such as *[the equivalent of Rule 26.08(3)]*) or for indemnity costs (such as *[the equivalent of Rule 26.08(2)]*) are clearly intended to instil a heightened sense of realism in the negotiation between parties. After offers are made, they know that they are at risk as to significant sums in costs. Plainly the rules are designed to promote offers to compromise by parties to litigation, with differing inducements to each. Equally clearly, they are designed to promote early offers of compromise. They introduce an added element of risk. But litigation is inescapably risky. It is essential that the risks be brought home to the parties by the lawyers advising them.

[37] The fact that the court has discretion to award judgment in a foreign currency where appropriate does not mean that in a proceeding where the court decides to award a judgment in Swiss francs, an offer to compromise in accordance with the Supreme Court Rules and expressed in Australian

dollars is invalid. There is no authority which supports the proposition that as a matter of law any offer of compromise must be made in the currency in which the award of damages is made by the court.

[38] To comply with the Order 26 the offer of compromise must be capable of being evaluated in money terms and of being compared in money terms with the judgment sum. That is easily done in this proceeding. The court is able to determine that the offer of compromise filed on 10 October 2005 is more favourable than the judgment sum awarded to the plaintiff.

[39] Swiss francs were not the only relevant currency. The amounts awarded for solatium by the court, which make up a significant proportion of the judgment sum, could have been awarded in Australian dollars.

[40] The amount of the offer of compromise was precise and certain and given the fairly narrow range within which the exchange rates had historically fluctuated, the plaintiff's legal advisors were well able to advise their clients approximately how many Swiss francs they would receive to within quite a small margin of error.

[41] While the court has the discretion under r 26.08(3) of the Supreme Court Rules to order costs otherwise than in accordance with the rule, "the party upon whom the offer of compromise was served carries a heavy burden; the presumption as to liability for costs which arises under the rule is not easily displaced.": *Simonovski v Bendigo Bank Ltd (No 2)* [2003] VSC 139 at [17]. The party seeking to persuade the court to depart from r 26.08(3) of the

Supreme Court Rules bears the onus of persuading the court that an order in accordance with the rule should not be made and, generally, "exceptional circumstances" are required to justify an order departing from the rule: *Shellharbour City Council v Johnson (No 2)* [2006] NSWCA 114 at [19]; *Hillier v Sheather* (supra) per Kirby P at 420.

[42] There were no exceptional circumstances in this proceeding. The only relevant information needed to assess the offer was information going to the quantum of the plaintiff's claim and to the likely proportion of contributory negligence. All of the relevant information was in the possession of the plaintiff at the time the offer of compromise was filed on 10 October 2005. The whole of the evidence going to the quantum of the plaintiff's claim came from the plaintiff or members of the plaintiff's family and was solely within their knowledge until communicated to the defendants.

[43] As to the finding of contributory negligence the court stated that:

> [T]he deceased was guilty of contributory negligence and … his actions contributed towards his death. The deceased voluntarily exposed himself to the risks that the rope swing presented. He was aware of the risk created by the narrow ledge on the bank and the submerged rocks. He must have also been aware of the risk of collision that existed if a person stood on the ledge on the bank to the west of somebody about to swing from the sloping tree trunk. Given the direction that the deceased was facing prior to the collision with Fabrice he must have seen that Fabrice was about to try to climb the sloping tree trunk in order to use the rope to swing into the water. He had climbed the sloping tree trunk at least twice to swing on the rope into the water and he was aware of the difficulties encountered when climbing the sloping tree trunk. Those difficulties would be known to any person who attempted to climb the sloping tree trunk with the rope: *Preti v Conservation Land Corporation and Ors* [2007] NTSC 25 at par [75].

[44] None of the evidence on which the finding of the court about contributory negligence was based came as any last minute surprise to the plaintiff or his legal advisors or from documents not discovered by the defendants in a timely fashion. The finding of contributory negligence was largely based on the evidence of witnesses called by the plaintiff – in particular that of Mr Lonsdale, whose evidence about the positions of Fabrice on the tree trunk and the deceased on the bank was accepted by the court.

[45] At the time the offer of compromise was served on the solicitors for the plaintiff, the plaintiff's legal advisors were in possession of all the relevant facts going to quantum and had sufficient information to appreciate that there was a risk of a substantial finding of contributory negligence. Nothing material changed between the date that the offer of compromise was served on the solicitors for the plaintiff and the trial of the proceeding.

[46] The facts that the plaintiff did not admit liability and that the defendants' discovery was not complete until very late in the proceeding are not reasons for departing from the ordinary cost consequences of r 26.08(3) of the Supreme Court Rules. The defendants' denial of negligence was not unreasonable. The contention that a reasonable person in the position of the defendants would have done nothing about the rope swing was arguable in light of the more recent High Court authorities.

[47] The documents that were belatedly produced and discovered by the defendants were not material to the plaintiff's assessment of the offer of

compromise filed on 10 October 2005. Those documents supported what had in substance always been the plaintiff's case. They did not give rise to an ambush. Assessing the worth of the offer of compromise involved a consideration of the issues going to quantum and contributory negligence.

The submissions of the plaintiff

[48] Senior Counsel for the plaintiff, Mr Meldrum QC, made the following submissions.

[49] To comply with Order 26 of the Supreme Court Rules an offer of compromise must be capable of being evaluated in money terms and of being compared in those monetary terms with the verdict of the court. For there to be compliance with the rules it was essential for the offer of compromise filed on 10 October 2005 to have been made in made in Swiss francs. This view was conveyed unequivocally by the plaintiff's solicitors to the defendant's solicitors. Nevertheless, the defendants persisted in making all offers of compromise in Australian dollars.

[50] The fact that the offers of compromise filed by the defendants were in amounts of Australian dollars meant that the risk of fluctuation in the rates of exchange was born by the plaintiff and meant that the judgment amount had inevitably to be compared, not directly with the offer of compromise, but via an exchange rate that fluctuated over time.

[51] The obligation of the defendants, had the plaintiff accepted the offer of compromise, was to pay the money within 21 days of the notice of

acceptance of the offer of compromise. The exchange rate varied through the period that the offer of compromise filed on 10 October 2005 was open to be accepted and for the 21 days thereafter. It is insufficient for the purposes of Order 26 of the Supreme Court Rules to be able to calculate retrospectively what would have been received in Swiss francs.

[52] When the plaintiff's legal advisors received the offer of compromise, they were unable to advise the plaintiff of its value in Swiss francs because it could not be predicted what the exchange rate would be when the amount offered in the offer of compromise was actually received by the plaintiff. They did not know what the rate of exchange would be on the date of payment.

[53] The court, in its discretion under r 26.08(3) of the Supreme Court Rules, should not make the standard order in default of the acceptance of an offer of compromise because the denial of negligence by the defendants was, in the circumstances, unreasonable; discovery by the defendants, and more importantly, the production of copies of documents for inspection was dragged out unreasonably by the defendants and, as a consequence, for much of the time that the third offer of compromise made by the defendants was open for acceptance, the plaintiff was still inspecting the copies of discovered documents that were ultimately made available to the plaintiff. These documents included vital documents relating to records of inspections at Ellery Creek Big Hole by the officers of the third defendant and records relating to the erection of signs thereat prohibiting the use of swing ropes.

[54] In *White v Director of Housing* 203 VSC 124, Gillard J ruled that the addition of a term in an offer of compromise other than the payment of the amount of money in settlement of the action and costs means that the offer of compromise is outside the provisions of Order 26 of the Supreme Court Rules. By analogy, an offer of compromise in any currency other than Swiss francs could not be accepted without conditions of terms relating to the rate of conversation of that currency into Swiss francs. It is not for these purposes material whether the offer was, as in this case, in Australian dollars or any other currency. The offer of compromise ought to unambiguously set out what is offered to compromise the dispute so that if accepted, the party accepting the offer understands with precision the effect of acceptance of the offer.

Conclusion

[55] I accept the submissions of the defendants. The first defendant was wholly successful and should have its costs of the proceeding. Rule 26.08(3) of the Supreme Court Rules applies to this proceeding. Save as expressed in the orders that I made on 10 May 2007, the second and third defendants should have their costs of the proceeding from 12 October 2005.

[56] The relevant offer of compromise is the offer of compromise that was filed on 10 October 2005. The terms of the offer of compromise filed on 10 October 2005 were in accordance with Order 26 of the Supreme Court Rules. The terms of the offer of compromise were stated clearly and

precisely and could be understood by the plaintiff and the plaintiff's legal advisors. The plaintiff and his legal advisors ought to have understood with reasonable precision the effect of acceptance of the offer of compromise. The facts of *White v Director of Housing* (supra) are distinguishable from this proceeding. Mr Whitelum did not request that the first offer of compromise made by the defendants be expressed in Swiss francs nor did he inform the defendants' solicitors that he could not advise the plaintiff and obtain instructions about the offer of compromise because of the extent of potential variations in the exchange rate. The plaintiff was capable of enforcing the offer of compromise by obtaining judgment in the terms of the offer of compromise if the offer of compromise was accepted and the defendants failed to comply with the offer of compromise.

[57] It is not strictly correct to say that the plaintiff simply bore the risk of the fluctuating exchange rate. The plaintiff may have also gained by movements in the exchange rate in his favour. The exchange rate moved in the plaintiff's favour on two occasions during the 35 days following the receipt of the first offer of compromise filed by the defendants. At no time was the exchange rate volatile.

[58] It is possible to determine if the offer of compromise filed on 10 October 2005 was more favourable than the judgment sum awarded to the plaintiff by the court. Plainly the offer of compromise filed by the defendants on 10 October 2005 was more favourable to the plaintiff than the judgment sum awarded to the plaintiff.

[59] Save as to the orders I made on 10 May 2007, there is no just reason for the court exercising its discretion and making an order as to costs otherwise than in accordance with r 26.08(3) of the Supreme Court Rules. Unlike other rules, Order 26 does not require a defendant who files an offer of compromise to state if liability is admitted or denied. It was not unreasonable for the second and third defendants to have persisted with a denial of liability. Nor does the dilatory discovery of various documents by the defendants' constitute a reason for departing from r 26.08(3) of the Supreme Court Rules. The documents that were discovered late did not alter the position of the plaintiff. The late discovery of the documents about which the plaintiff complains in no sense constituted any kind of ambush. The documents supported what had substantially been the plaintiff's case throughout the proceeding. Assessing the worth of the offer of compromise involved a consideration of the issues going to quantum and contributory negligence. At the time the offer of compromise was served on the solicitor's for the plaintiff, the plaintiff's legal advisors were in possession of all the relevant facts going to quantum and had sufficient information to appreciate that there was a risk of a substantial finding of contributory negligence. Nothing material changed between the date that the offer of compromise was served on the solicitors for the plaintiff and the trial of the proceeding.

[60] However, unnecessary costs were incurred by the plaintiff in order to obtain proper discovery from the defendants and as a result of the late notice that

Dr Maeder, Melissa Preti and Gregory Preti would not be required for cross examination. The second and third defendants were under the same continuing obligation to provide discovery as applies to all defendants. It is important that the solicitors for such defendants fully advise them about discovery and that they also peruse the defendants discovered documents in order to determine if there are any other documents that should be discovered and that such matters are attended to in accordance with Supreme Court Rules or as agreed between the parties or allowed by the court. It is also important in circumstances where a proceeding is extensively case managed and orders are made for the delivery of witness statements that careful and deliberate consideration is given to which witnesses are required for cross-examination.
