

CINEMA CENTER SERVICES PTY LTD V EASTAWAY AIR CONDITIONING PTY LTD [2000]
ACTSC 17

Supreme Court of ACT – 15 February 2000

FACTS

Cinema sued Eastaway and recovered damages of \$285,859.26 against Eastaway. Cinema applied for an indemnity costs order against Eastaway. On 21 August 1998, Cinema had written to Eastaway offering to accept \$280,000.00 plus costs in settlement of the proceeding. Eastaway did not respond to the offer.

The proceeding was listed for hearing on 24 August 1998 but by consent on 31 July 1998 was adjourned to 23 November 1998. On 31 July 1998, Cinema was ordered to provide particulars of its damages and the parties were also ordered to make discovery. Discovery was apparently not completed by 8 September 1998.

The trial commenced on 23 November 1998 and a judgment was handed down on 17 December 1999. On 8 March 1999, after the hearing on liability, Cinema wrote to Eastaway offering to accept \$220,000.00 plus costs in full settlement of the proceeding. However, Cinema expressly stated that if the judgment in its favour exceeded \$280,000.00 it would rely on its letter of 21 August 1998.

Cinema claimed that it should be awarded indemnity costs from 21 August 1998 or 8 March 1999.

ISSUES

Should the Court order that Eastaway pay indemnity costs and if so from when?

FINDING

The Court ordered that Eastaway was to pay indemnity costs from 16 March 1999.

The earlier offer was made at a time when Eastaway was not in a position to fairly assess the merits of Cinema's claim for damages, and it would be unfair to award indemnity costs from that time. However, by 16 March 1999, Eastaway was aware of the merits of the offer and should have accepted the 8 March 1999 offer.

QUOTE

Miles CJ said:

“The plaintiff’s offers were at both stages, on the face of it, reasonable, since the plaintiff eventually recovered more than was offered on either occasion. By the same token, however, it could not be said that the defendant’s failure to accept the earlier offer of \$280,000.00 with costs ... was unreasonable. The experts’ reports ... remained to be served, and when they were served they left the defendant with very little time in which to respond. Particulars of the plaintiff’s claim for damages were not supplied until 10 August 1998. In my view, the defendant and its legal advisers were not in a position to make a reasonably informed decision as to the reasonableness or otherwise of the plaintiff’s first offer at the time it was made.”

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IMPACT

While offers of compromise can be powerful tool for placing pressure on a party to settle, they can not be used to penalise a party who does not accept the offer if that party was not in a position to assess the merits of the offer.

The party making the offer should provide the other party with enough information to make an informed decision before serving the offer.

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