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risk watch

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Riskwatch is prepared by Law Claims to assist practitioners in identifying risky areas in practice and to highlight risk prevention strategies to allow for safer, more enjoyable practice. Riskwatch appears as a monthly column in the Law Society Bulletin as well as being distributed on a monthly basis to members of the Law Society's Professional Indemnity Scheme who do not receive the Law Society Bulletin.

"The law loves compromise… But…"

By Grant Feary, Senior Solicitor, Law Claims

In *Hall & Hall v Basbuild Pty Ltd* [2013] SADC 132 his Honour Judge Beazley quoted some very interesting remarks by Lord Bingham of Cornhill (then Lord Chief Justice of England)[1] as to settlement agreements as follows:

> **"The law loves compromise.**
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> *It has good reason to do so, since a settlement agreement freely made between both parties to a dispute ordinarily commands a degree of willing acceptance denied to an order imposed on one party by court decision. A party who settles foregoes the chance of total victory, but avoids the anxiety, risk, uncertainty and expenditure of time which is inherent in almost any contested action, and escapes the danger of total defeat.*
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> *The law reflects this philosophy; by making it hard for a party to withdraw from a settlement agreement, as from any other agreement, as from any other agreement, and by giving special standing to an agreement embodied, by consent, in an order of the court. Rules of Practice are framed so as to encourage settlement, by exposing the substantial loser of the action to a heavy burden of costs, and enabling the same protection against that burden.*
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> ***But there is always a catch. To negotiate a final and binding settlement agreement,*** *to make sure that all necessary matters are covered, to express the terms clearly and unambiguously, to make sure that the agreement is simply and inexpensively enforceable, to advise where one party claims that he has been misled or pressured into making an agreement with the other side, all this* ***may call for as much skill, including legal skill, as fighting the action." (emphasis added).***

The case before Judge Beazley involved a situation where a builder, the Plaintiff, had sued the Defendants in respect of monies the Plaintiff alleged were owing to it pursuant to building contract. The claim was for the principal sum of $67,500.

[1] These remarks are from Lord Bingham's Foreword to the fourth edition of Fossett's "*The Law and Practice of Compromise*" and were also quoted by Atkinson J in the Supreme Court of Queensland in *Crawley v Crawley Land* [2012] QSC 294 at [5].

On the same day as the claim was filed (1 May 2008) a formal Offer of Settlement, pursuant to Rule 187 of the District Court Rules was also filed stating that the Plaintiff would settle the action for payment to it of $40,000, plus costs fixed in the sum of $3,500. As is appropriate under the Rules, no specified time limit was placed on the acceptance of the Offer, and it was not revised.

Nearly three years after the Plaintiff's Offer was filed the Defendants, on 11 January 2011, filed their own Offer of Settlement, offering to pay the plaintiff $25,000 plus costs of $3,500. Shortly after that, however, on 9 February 2011, the Defendant filed a Notice of Acceptance of the Plaintiff's Offer i.e. $45,000 plus $3,500 costs.

The problem was, of course, that nearly 3 years of litigation had meant that the actual costs incurred by the Plaintiff were far greater than $3,500. The Plaintiff was then in the somewhat unenviable position of having to argue that the Offer of Settlement it filed nearly 3 years earlier was ineffective otherwise it would be limited to recovering only $3,500.00 for its costs.

After considering a number of arguments raised by the Plaintiff as to the formalities required for the Offer of Settlement and a subsequent Notice of Acceptance of that Offer to result in an enforceable order of the Court, Judge Beazley found that both the Offer and its Acceptance were effective. The Defendants were therefore required to pay only the sums of $45,000 and $3,500 for the claim and costs respectively.

This case, and the remarks of Lord Bingham, underline the importance of carefully considering the effect of the Court Rules as to Offers of Settlement and the need for constant vigilance as to whether filed Offers should be revised or withdrawn as the litigation proceeds.

For any queries about this or other Risk Management Services offered by Law Claims, please contact the PII Risk Manager, Gianna Di Stefano, on 8410 7677.