



Précis Paper

Offers of Amends and Offers of Compromise

A discussion of *Nationwide News Pty Ltd v Vass [2018] NSWCA 259*, a case which examined the interaction between Offers of Compromise under the UCPR, Offers of Amends under the Defamation Act, and basic contractual principles such as offer and acceptance.

Discussion Includes

- The chronology of events
- The function and purpose of an Offer of Amends
- The primary judgment
- The main issues in the appeal
- Why is this case significant?
- Practical lessons

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Offers of Amends and Offers of Compromise

1. In this edition of BenchTV, Peter Gray SC (Barrister, 153 Phillip Chambers) and Phillip Chapman (Barrister, 153 Phillip Chambers) discuss *Nationwide News Pty Ltd v Vass [2018] NSWCA 259*. Although this case arose in a defamation context, it was also a case which examined basic contractual principles such as offer and acceptance.

The chronology of events

2. The respondent was Mr. Vass, an art collector. The appellant was Nationwide News, the publisher of the Sunday Telegraph.
3. In 2015, Mr. Vass purchased from a well-known art gallery what is known as a pentaptych, which is a composite artwork consisting of five panels, by the well known, Archibald-winning artist Del Kathryn Barton.
4. Not long after Mr. Vass purchased the artwork, the Sunday Telegraph published an article that alleged that Mr. Vass had broken the terms of the purchase contract, essentially by selling a number of the panels independently of the whole. According to the Sunday Telegraph report, this was not permitted under the gallery's terms of sale.
5. Mr. Vass' stance in the case was that he had not sold the panels separately, and that the actual terms of the contract would not have prevented him from doing so.
6. In response to the article, Mr. Vass sent a concerns notice under the *Defamation Act 2005 No77 (NSW)*.
7. Nationwide News then responded with an offer of amends under the Defamation Act.
8. Nationwide's initial offer of amends proposed only an apology, without any offer of monetary compensation whatsoever. This offer contained the critical words stating that the offer was "open to be accepted until commencement of the trial, unless withdrawn in writing". Those last words, "unless withdrawn in writing", assumed great significance.
9. Mr. Vass regarded that offer as unreasonable, and did not accept it. He commenced his proceedings, served his statement of claim, and a year later before any defense had been filed, Mr. Vass made an offer of compromise under the *UCPR* for a particular amount.
10. What Nationwide News did in response at that point was to renew the earlier offer of amends under the *Defamation Act* with what is called under the Act a 'renewed offer of amends', in other words a second or subsequent offer of amends. This time it did include a figure by way of damages, as well as the apology, and again their offer contained the critical words "open to be accepted until commencement of the trial, unless withdrawn in writing".

11. Having sent the renewed offer of amends, Nationwide News filed its Defence, which included specific reliance on that renewed offer of amends.
12. Some time later Mr. Vass sent a second offer of compromise under the *UCPR*, to which Nationwide News did not respond.
13. Five weeks before the trial, however, Mr. Vass simply accepted (by his solicitor's letter) Nationwide News' second offer of amends, notwithstanding that he had in the meantime sent a second offer of compromise.
14. Nationwide News then took the position that its second offer of amends was no longer open and no longer capable of acceptance. Nationwide contended that Mr. Vass' second offer of compromise was a counter-offer which implicitly rejected the offer of amends.

The function and purpose of an Offer of Compromise

15. The offer of compromise regime under *Rule 20.26, Uniform Civil Procedure Rules 2005 (NSW)* provides that either party can make an offer to settle the case by a particular form. The offer remains alive for 28 days, after which it lapses if it is not accepted.
16. If the offer is not accepted in that time, and the offeree ultimately does less well at the trial than the offer would have been, the offeror is very likely to get a favourable costs order from that point onwards.
17. The offer of compromise regime operates as a very strong incentive to settle cases.

The function and purpose of an Offer of Amends

18. The function and purpose of an offer of amends regime under *s12 Defamation Act 2005 No77 (NSW)* is quite different in important ways. It is a different statutory scheme, under a different Act, and the offer of amends regime does not directly intersect with or incorporate any part of the offer of compromise provisions found in the *Uniform Civil Procedure Rules*.
19. What the offer of amends does is to allow a publisher, a defendant or a prospective defendant to offer to make amends to the plaintiff or the person who is aggrieved by the publication for what has been published.
20. An offer of amends typically includes two basic features. One is an apology and/or a retraction; the second is a sum of money by way of damages.
21. Very importantly, under *s18 Defamation Act 2005 No 77 (NSW)*, if a court later considers that the offer of amends was reasonable and that offer was not accepted, it constitutes a complete defence to the plaintiff's claim in defamation. In other words, the plaintiff loses the cause of action altogether.
22. An offer of amends can thus be a very powerful weapon for a defendant in terms of the actual result of the litigation.

23. An offer of amends is not principally directed to settlement or to cost questions, although a failure to accept a reasonable offer can result in an indemnity costs order that is provided against the plaintiff, under *s40 Defamation Act 2005 No77 (NSW)*.
24. *Section 40* also provides that a defendant's failure to make a reasonable offer can sometimes result in an indemnity costs order as well.
25. *Section 12* spells out that the offer of amends provisions may be used instead of and separately from any other mechanisms relating to settlement that may be available elsewhere under the law.

Primary Judgment

26. Mr. Vass brought an application before the trial judge McCallum J to determine as a preliminary question whether or not Nationwide News' second offer of amends had been validly accepted by Mr. Vass, notwithstanding Mr. Vass' second offer of compromise.
27. Her Honour considered the question and competing arguments, and ultimately found for Mr. Vass. She did so holding that the second offer of amends had remained open to be accepted by Mr. Vass; that his second offer of compromise did not have the effect (as was contended by Nationwide News) of implicitly rejecting the second offer of amends; and that in Her Honour's view Mr. Vass' acceptance of the second offer of amends was complete, valid, and it was binding on the parties.

The main issues of the appeal

28. Nationwide News then sought leave to appeal, which was granted. However, the Court of Appeal unanimously dismissed the appeal, with each of the three judges delivering separate reasons.
29. There were two main issues. The first was: were the amends provisions in the *Defamation Act* to be construed by reference to ordinary contractual principles, where for example an offer is taken to be rejected if met with a counteroffer. Nationwide News submitted that the offer of amends should be construed by reference to those sorts of traditional perspectives, and Mr. Vass submitted that the offer of amends provisions were a standalone statutory regime, and they were not to be modified by reference to common law decisions about contracts generally, and essentially the Court of Appeal upheld Mr. Vass' submissions in that regard.
30. McColl J said that although a plaintiff's failure to accept an offer of amends within a specified time is tantamount to its rejection, that does not necessarily lead to the same consequence as under general law contractual provisions. The offer of amends regime

under the *Defamation Act* is discrete from and does not intersect with alternative means of settling defamation disputes, except in relation to costs under s 40.

31. Secondly, her Honour said that the offer of amends regime is a creature of statute, and that as a result the text, the context and the purpose of the offer of amends regime indicated that the provisions should not be construed by reference to ordinary contractual principles.
32. Thirdly, her Honour said that the offer of amends regime under the *Defamation Act* was also separate from the offer of compromise regime under the *UCPR*, holding therefore that Mr. Vass' offer of compromise under one regime, the *UCPR*, would not operate as a counteroffer under the other regime, the offer of amends provisions.
33. The second main issue in the case was the significance of the wording in Nationwide News' offer of amends letter. Mr. Vass submitted that the terms were clear and that the words meant what they said: "open to be accepted until commencement of the trial, unless withdrawn in writing". This was consistent with the text of the offer of amends provisions. In s 16 it is provided that the way to withdraw is by notice in writing. The Court of Appeal accepted Mr Vass' submissions on this point.
34. Nationwide submitted that on its true construction the words of the offer of amends should be read as meaning that the offer remained open to be accepted unless withdrawn in writing or rejected, and that Mr. Vass' offer of compromise did amount to a rejection of that offer. This was rejected by the court both at first instance and on appeal, as no such additional words were found in the letter.

Why is this case significant?

35. The case involved consideration of contractual principles in a somewhat unfamiliar setting, namely a defamation case – a defamation case that brought into play not one but two statutory regimes.
36. In doing so the Court of Appeal recapitulated what it had said in some earlier cases such as *Brambles Holdings v Bathurst City Council (2001) 53 NSWLR 153*, in which Heydon J, speaking for the court in a leading judgment, had said in effect that a counteroffer will not always in every single instance have the effect of rejecting the earlier offer.
37. *Nationwide News Pty Ltd v Vass [2018] NSWCA 259* also involved the interrelationship between the two statutory regimes and general contractual provision, and the interrelationship between those two statutory regimes themselves. That in itself is interesting and somewhat nuanced because both of them are, broadly speaking, directed at objectives which are aligned with the just, cheap and quick ideal which all court rules have enshrined in them nowadays.
38. The two different regimes have different starting points and only partial overlap of objectives, some to do with settlements, some to do with provision of the defense.

39. There is an express provision in the offer of amends sections of the *Defamation Act* that each of the two regimes can operate independently of the other, even though both can be invoked at the very same time by one or both parties.
40. The combination of all of those threads inevitably leads to some strains on those interrelationships.
41. The task of the court is to tease out and disentangle those tensions and strains and arrive at a coherent reading of the overall will of the Parliament.
42. With cases involving statutory construction, this is often a complicated and intricate exercise.

Practical lessons

43. Whenever you are writing a letter or any document that is to be used as a mechanism for the settlement of a case or for bringing a case to an end, take great care in the words that you use.
44. If you use particular words, be aware yourself of what they mean and what you need to do if events don't pan out ideally.

BIOGRAPHY

Peter Gray SC

Barrister, 153 Phillip, Barristers, Sydney

Peter Gray was admitted to the Bar in 1986, and appointed Senior Counsel in 2003. He specialises in defamation and related media law, and has appeared in many prominent cases.

He also practises generally in the commercial and common law fields, including trade practices and professional negligence, as well as in criminal law. He has extensive experience in the conduct of commissions of inquiry both state and federal.

He is an experienced mediator, having conducted numerous mediations since the early 1990s. He is accredited pursuant to the National Standards and is on the panels of mediators approved by the NSW Supreme and District Courts.

Luke Chapman

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Luke has a busy commercial practice and has developed a specialised profile in financial and corporate crime.

His particular expertise is in proceeds of crime litigation and asset forfeiture proceedings. Luke appears in all jurisdictions including regularly appearing in Courts out of metropolitan Sydney.

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Nationwide News Pty Ltd v Vass [2018] NSWCA 259

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Cases

Brambles Holdings v Bathurst City Council (2001) 53 NSWLR 153

Legislation

Defamation Act 2005 No77 (NSW)

Rule 20.26, Uniform Civil Procedure Rules 2005 (NSW)

