PARTIES:	GARRY SHOESMITH
	v
	NORTHERN TERRITORY OF AUSTRALIA
	AND
	KATHERINE TOWN COUNCIL
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	SUPREME COURT
FILE NO:	492 of 1990
DELIVERED:	Darwin 13 November 1995
HEARING DATES:	10 August 1995
JUDGMENT OF:	MARTIN CJ.

CATCHWORDS:

Practice and Procedure - NT - Offer of compromise - Action for negligence - No relevant response to the notice - Construction of the rules - Costs - Exercise of the Court's discretion -

Supreme Court Rules (NT) r26.02, r26.10.

Henderson v Simon Engineering (Australia) Pty Ltd and Others [1988] VR 867, approved.
Malliaros v Moralis [1991] 2 VR 501.

REPRESENTATION:

Counsel:

Plaintiff: Mr I Morris
lst Defendant: Mr R Wild QC
2nd Defendant: Mr J Stewart

Judgment category classification: N/D
Judgment ID Number: mar95022
Number of pages: 6

mar95022

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 492 of 1990

BETWEEN:

GARRY SHOESMITH
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
First Defendant

AND:

KATHERINE TOWN COUNCIL
Second Defendant

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 13 November 1995)

This is a ruling on a question of costs as between the defendants. The plaintiff succeeded in his claim against them for damages for negligence. Liability was denied. As between the defendants, there were issues as to which of them should bear the loss, and, if both, as to the proportion which each of them ought to bear. They were both found liable, and it was held that it would be just and equitable that the damages be borne equally between them.

Shortly prior to the commencement of the hearing, on 13 April 1995, the second defendant served a document on the first defendant entitled "Offer of Compromise". It was in the following terms:

> "THE KATHERINE TOWN COUNCIL, the Second Defendant, HEREBY OFFERS to consent to an apportionment of the contribution between the Defendants towards any damages recoverable by the Plaintiff against either of them on the basis of the Second Defendant's share being 50% and the First Defendant's share being 50%.
>
> This Offer of Compromise is open to be accepted for 14 days after service."

It was purported to be given pursuant to r26.02, but that does not apply, and in argument reliance was placed upon the provisions of r26.10. That rule reads:

> "(1) Where in a proceeding a defendant makes a claim (in this rule called "a contribution claim") to recover contribution or indemnity against a person, whether a defendant to the proceeding or not, in respect of a claim for a debt or damages made by the plaintiff in the proceeding, a party to the contribution claim may serve on any other party to the contribution claim an offer to contribute toward a compromise of the claim made by the plaintiff on the terms specified in the offer.
>
> (2) The Court may take an offer to contribute into account in determining whether it should order that the party on whom the offer to contribute was served should pay the whole or part of -
>
> (a) the costs of the party who made the offer; or
>
> (b) any costs which that party is liable to pay to the plaintiff.
>
> (3) Rules 26.04 and 26.05, with the necessary changes, apply to an offer to contribute as if it were an offer of compromise."

The second defendant made no relevant response to the notice, and the first defendant now says that it should have the whole of its costs relating to the apportionment issue incurred after the notice was served, since the offer it made was vindicated by the Court's decision. If the offer falls within the terms of r26.10, the discretionary powers of the Court in relation to costs under r63.03 are not affected, except that the Court is authorised to take such an offer into account in determining the costs orders it should make in relation to the matters referred to in r26.10(2).

The second defendant submits that r26.10 does not apply. It says that on the face of it, the notice was not an offer by the first defendant to contribute towards a compromise of the claim made by the plaintiff. However, the rule does not require evidence of a compromise having been reached or even proposed by the plaintiff or either defendant as at the date of the notice. A compromise on quantum was reached in the course of hearing prior to the close of the plaintiff's case. Had the offer contained in the notice been accepted, that would have put an end to the question of apportionment of the agreed sum between the defendants.

The rule does not envisage an offer being made by a defendant to make a contribution to quantum determined by the Court. It only talks about a compromise of the claim made by the plaintiff. The notice refers to "damages recoverable", which is apt to describe the plaintiff's remedy in respect of a compromise or upon determination. Although the offer was wider in its terms

than that referred to in r26.10, its terms included those referred to in the rule. There is no prescribed form.

In *Henderson v Simon Engineering (Australia) Pty Ltd and Others* [1988] VR 867 at 871-2 Murphy J. said:

> "It would seem to me that when O.26 of the new rules was made it was hoped that its terms would remove some, if not all, of the formality which may have been seen in the decisions in this Court to attach to the corresponding rules which preceded them ..... The attempt in the new O.26 to deal but broadly with all contingencies serves to emphasise that the Court (when considering the issue of costs as I am now doing) will approach the matter attempting to give effect to the spirit of the rule, rather than by slavishly applying its words as a code, within the precise terms of which an applicant must bring himself, before becoming entitled to a favourable exercise of the Court's discretion on the issue of costs."

Similarly in *Malliaros v Moralis* [1991] 2 VR 501 at 505 McGarvie J. said:

> "A Judge does not approach the rules as though acting as devil's advocate, seeking by ingenuity to attribute to them by a process of construction or implication, some erratic and unjust operation which their words might be regarded as capable of supporting."

Their Honours were there speaking of rules in the same or very similar terms to those here under consideration, and with respect, I agree with their observations.

The offer was capable of being accepted. It ought to have put an end to the issues between the defendants which were not insignificant in the context of the proceedings as a whole. The second defendant offered to bear the burden of damages

recoverable by the plaintiff in equal proportions with the first defendant, regardless of which of them might be found to be liable for it, or whether both were found to be liable in respective proportions. That may not have shortened the trial of issues as between the plaintiff and the defendants, but would have obviated the dispute between the defendants. It is open to apply r26.10(2)(a) in this case.

The taking of evidence commenced in Sydney commencing on 1 May 1995. It continued for much of that week and was largely devoted to the issue of liability, as between the plaintiff and the defendants, although there was some medical evidence going to the plaintiff's loss. At the conclusion of that period, agreement was reached as to the quantum of the plaintiff's claim should he be wholly successful on liability. The hearing resumed in Darwin on 15 May. Liability between the plaintiff and the defendants was still in issue and the plaintiff's case was closed later that morning. During that afternoon, and the whole of 16 May and for most of 17 May, the defendants presented their respective cases comprising written and oral evidence going to the question of occupation and control of the land upon which the plaintiff was injured. The evidence of each defendant was directed, firstly, to attempting to show that it was not an occupier or in control of the land by way of a defence to the plaintiff's claim, and, secondly, that the other of them was the occupier or in control. That evidence was also used on the question of apportionment. Addresses took up most of the Court sitting time on 18 May and were directed to all issues then outstanding.

On a broad estimate, the time devoted to issues as between the defendants at trial, including addresses, was of the order of two days. Although the offer was made late, it was open for acceptance for 14 days, a period expiring just prior to the date fixed for the commencement of the proceedings in Sydney. That was sufficient time to enable the first defendant to accept if it were minded to do so. On the other hand, the second defendant would have to continue its preparation for trial during that period, which it had quite fairly allowed, and the first defendant should not be penalised in costs for that. The second defendant's witnesses' evidence was directed to both issues of liability to the plaintiff and apportionment. Their attendance would have been required even if the offer had been accepted and no expense has been particularly identified as going only to the issue between the defendants.

In all the circumstances it is ordered that the first defendant pay to the second defendant its costs of two days of trial on a party and party basis.