



Transcript of Proceedings

Copyright in this transcript is vested in the Crown. Copies thereof must not be made or sold without the written authority of the Director, State Reporting Bureau.

REVISED COPIES ISSUED
State Reporting Bureau
Date: 17 August, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JONES J

No 563 of 2002

RICHARD LAURENCE JONES and
ELIZABETH ANN JONES

Applicant

and

MARK VINCENT MILLWARD and
ROSEMARY JANE LEA

Respondent

CAIRNS

..DATE 13/08/2004

JUDGMENT

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act* 1999, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: This is an application for costs made by the plaintiff and the third party. Each of the parties have made written submissions pursuant to the direction made by me at the time of handing down my decision on the 26th of May 2004.

The plaintiff and third party were each successful in the respective claims. The third party seeks costs to be assessed on the standard basis, and this is not opposed by the defendants. The costs of the third party proceeding should follow the event and there is no reason why the applicant should not be ordered to pay costs on the standard basis.

The plaintiffs seek cost to be assessed on an indemnity basis based upon an offer to settle purportedly made under chapter 9 part 5 of the Uniform Civil Procedure Rules. That offer was for the totality of the principal relief claimed, namely an order for specific performance of a contract for the sale of land and costs. The plaintiffs pleaded an alternative claim in damages, but this was later abandoned.

The nature of the relief of specific performance does not readily admit any compromise. Either it will be ordered or it will not be, and it is, of course, a discretionary relief which does not mean that relief will necessarily follow even though a prima facie entitlement is shown. But further to that an offer to settle, which is effectively for the whole of the claim, may not be within the contemplation of the relevant rule, namely rule 355 of the UCPR.

This point was considered by Justice Ambrose in *Bruce Mitchell v Pacific Dawn Pty Ltd* 2003 QFC 179, and particularly at paragraph 29, which I now quote, "In my view an offer to settle within the contemplation of UCPR 353 on acceptance of which will lead to an order for indemnity costs will not include an 'offer' by one party to accept the whole of the relief it seeks in its claim or application, particularly where the nature of relief claimed is such that it will be either granted or refused unconditionally. The making of a purported offer on the terms recorded in paragraph 8 hereof is not designed 'to settle' or compromise any issue between the parties. In effect, it required the complete capitulation of the defendant. It did not involved anything less than the defendant's abandonment of a critical part of its defence. If the plaintiffs contention be correct, the making of that 'offer' have the effect of making the defendant liable for indemnity costs, if it failed, but entitled only to standard costs if he succeeded. Even if, upon its proper construction UCPR 353 would theoretically permit the award of indemnity costs on the basis of the 'offer' recorded in paragraph 8 hereof, in my view, without something else it would be 'inappropriate' to make such an award."

I adopt, with respect, these remarks, which is to the effect (contrary to what was submitted by counsel for the plaintiffs) that indemnity costs should not be awarded on such an offer. His Honour Judge McGill took a similar view in the case of *JLG Industries Inc v TeeTree Pty Ltd* 2002 QDC 31, particularly at paragraph 5.

I will not recite in full that paragraph, but he repeats the view that the effect of construing such a proposition as an 'offer' would be an automatic step for indemnity costs to be recovered by plaintiffs who are successful.

10

Further to those comments, I note that the nature of the relief of specific performance does not readily admit of absolute capitulation. The claim raised here was simply of specific performance of the subject contract. The order which I ultimately made was rather a declaration that the defendants were bound to specifically perform the contract.

Compliance with such orders for specific performance lead to a host of other considerations. For example, during the course of the hearing in this case evidence was given by the plaintiffs of incurring expense, and altering the property to comply with the licence requirements under the Statute requiring a licensing of a pontoon which formed part of the subject property.

30

This, and other matters, have the potential to qualify the terms in which an order for specific performance would be implemented. If there is a dispute over such matters it is necessary that these matters be aired during the hearing, as was the case in these proceedings.

50

Taking those matters into account, even if it be the case that an offer was made such as to invoke the provisions of 360 of

the UCPR, it is in all the circumstances, appropriate for a different order to be made. Exercising my discretion, I would order costs be assessed on a standard basis.

My orders then will be in respect of costs:

- 1) that the defendants pay the costs of and incidental to the action other than reserved costs as to be assessed on a standard basis;
- 2) that the defendants pay the costs of the third party in relation to the third party claims to be assessed on a standard basis.

The question of reserve costs relate to three applications made respectively on the 14th of May 2003, application for speedy trial; on the 6th of June 2003, application for further and better particulars; and on the 14th of July 2003, an application by the defendants for further and better disclosure.

In relation to the speedy trial, the plaintiffs failed on that application in so far as no order was made, but I believe that it was appropriate for the order to be sought given the nature of the relief which was being sought, and the circumstances which attended to any delay in the hearing of the case. Costs will be costs in the course.

In relation to the application for further and better particulars, the plaintiff was successful in respect of one of

three requests. The defendants approach to that application was not to refuse the particulars in respect of which the plaintiff was successful. In relation to that application I make no order as to costs.

1

In relation to the third application, namely the defendants application to seek further and better disclosure, the defendants were successful in obtaining orders in that case. In all the circumstances, I would rule that the defendants are entitled to the costs reserved in respect of that application. Any other orders, gentlemen?

10

...

30

50