

# SUPREME COURT OF QUEENSLAND

CITATION: *Bigby v Kondra & Anor (No 2)* [2017] QSC 154

PARTIES: **GRAHAM CHARLES BIGBY and LYNETTE  
GWENDOLINE BIGBY**  
(plaintiffs)  
v  
**DANIEL JOHN KONDRA**  
(first defendant)  
and  
**ZURICH AUSTRALIAN INSURANCE LIMITED**  
(second defendant)

FILE NO: 7798 of 2013

DIVISION: Trial Division

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 27 July 2017

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Daubney J

ORDER: **1. The defendants shall pay the plaintiffs' costs of and incidental to this proceeding, such costs to be assessed on the standard basis up to and including 15 April 2016, and thereafter to be assessed on the indemnity basis.**

**2. The second defendant shall pay the first defendant's costs of and incidental to this proceeding (less the sum of \$37,000), such costs to be assessed on the indemnity basis.**

**3.**

**a. The second defendant is liable to indemnify the first defendant for his liability to the plaintiffs in respect to the costs which are the subject of Order 1.**

**b. Further direct that, in respect of the costs which are the subject of Order 1, the plaintiffs shall exhaust their means of enforcement and recovery against the second defendant before seeking to recover those**

**costs against the first defendant.**

CATCHWORDS: PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON THE INDEMNITY BASIS – where judgment has been entered for the plaintiffs – where the plaintiffs made a formal offer to settle – where the plaintiffs seek their costs in the proceeding on the indemnity basis pursuant to UCPR r 360 – whether the form of offer was sufficiently unambiguous – whether the offer to settle was an offer of a genuine compromise – where a later *Calderbank* offer was made – where the second defendant wrongly repudiated its obligation to indemnify the first defendant – whether the first defendant should be ordered to pay the plaintiff’s costs on the indemnity basis – whether the second defendant is liable to indemnify the first defendant in respect of its costs

*Uniform Civil Procedure Rules 1999 (Qld), r 360*

*Bigby v Kondra* [2017] QSC 37

*Calderbank v Calderbank* [1975] 3 All ER 333

*Scrase v Jarvis* Unreported, Supreme Court of Queensland, 21 April 1998.

COUNSEL: S S W Couper QC for the plaintiffs  
M Callanan for the first defendant  
R Cavanagh SC with D Williams for the second defendant

SOLICITORS: Carter Newell for the plaintiffs  
McInnes Wilson for the first defendant  
Landers & Rogers for the second defendant

- [1] The background to this matter is set out at length in *Bigby v Kondra & Anor* [2017] QSC 37, in which I ordered that the plaintiff have judgment against the first defendant in the sum of \$1,822,490.43 (inclusive of interest to the date of judgment), and declared that the second defendant was liable to indemnify the first defendant in respect of that judgment. It is now necessary to deal with questions of costs.
- [2] The plaintiffs’ initial position on costs was to rely on an offer to settle which had been made pursuant to *UCPR* Chapter 9 Part 5 on 28 October 2015. That offer was for the defendants to pay to the plaintiffs “the sum of \$1.8 million in full and final settlement of the plaintiffs’ claim”.

- [3] The second defendant contended that this form of offer was not sufficiently unambiguous as to leave no reasonable doubt about what was being offered. The issue underpinning this submission was that the offer, in this form, did not differentially identify any interest component.
- [4] It is, however, unnecessary to decide the matter on that basis because, on any view, the offer to settle made on 28 October 2015 was not a genuine offer of compromise. The quantum of the claim pleaded by the plaintiffs as at the date of that offer was \$1,186,622.02. In submissions, it was properly conceded for the plaintiffs that, if one calculated interest in accordance with Practice Direction 7 of 2013 from the agreed date of 19 March 2010, then the offered amount of \$1,800,000 would have been greater than the amount claimed plus that interest. In those circumstances, the plaintiffs properly conceded that they could not demonstrate arithmetically that the offer involved an element of compromise.
- [5] In light of those concessions, it is not appropriate to have regard to the offer made on 28 October 2015.
- [6] Then, by a letter to both of the defendants' solicitors dated 8 April 2016, which was marked "Without prejudice save as to costs", the plaintiffs' solicitors made the following offer:
- "The plaintiffs offer to settle their claim against both defendants on the payment by the defendants to the plaintiffs of \$1 million, inclusive of interests, plus the costs of this action, including the costs ordered to be paid by the second defendant to the plaintiffs pursuant to the order made by Justice Applegarth on 26 November 2015 with respect to the second defendant's application concerning the withdrawal of certain express and deemed admissions."
- [7] The letter further stated:
- "This offer to settle will remain open for acceptance by your clients until 5 pm on Friday, 15 April 2016."**
- [8] The second defendant did not contest the efficacy of this *Calderbank* offer, and conceded that the Court's discretion was enlivened to order indemnity costs from the date of expiry of that offer, i.e. 15 April 2016.

- [9] The plaintiffs, however, contended that indemnity costs ought be awarded from 12 April 2016. The plaintiffs pointed to the fact that the defendants had made offers to settle on 5 and 6 April 2016, that the trial was to commence on 18 April 2016, that the defendants had obviously given consideration to compromise, and the amount offered by the plaintiffs was a significant compromise. The plaintiffs argued that a reasonable time for the defendants to consider the offer was until the end of 11 April 2016.
- [10] Be all that as it may, the simple fact is that the plaintiffs' own *Calderbank* offer, by its express terms, was open for acceptance until 5 pm on 15 April 2016. It is appropriate, in my view, that the indemnity costs consequences flow only from the time that offer lapsed. Accordingly, the plaintiffs will recover their standard costs up to and including 15 April 2017 and thereafter on the indemnity basis.
- [11] The position of the first defendant requires separate consideration. As was noted in the principal judgment<sup>1</sup>:
- “[4] The first defendant held “Business Insurance” with the second defendant. In December 2008, the first defendant made a claim under that policy for indemnity in respect of any liability he might have to pay compensation to the plaintiffs for the damage they suffered. Some six years later, the second defendant denied any obligation to indemnify the first defendant. In May 2015, the first defendant assigned his rights to indemnity under the insurance policy to the plaintiffs, and the second defendant was subsequently given notice of that assignment.
- [5] Accordingly, in this proceeding the plaintiffs also seek a declaration that the second defendant is obliged to indemnify the first defendant in respect of the first defendant's liability to the plaintiffs.”
- [12] The second defendant conceded that it ought indemnify the first defendant for the plaintiffs' reasonable costs assessed against the first defendant, and also conceded the appropriateness of ordering the second defendant reimburse the first defendant for the reasonable costs of defending the plaintiffs' claims (less certain deductions).
- [13] In relation to the first defendant's exposure to the costs order which will be made in favour of the plaintiffs, there seems to me to be no reason why the first defendant ought

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<sup>1</sup> At [4] – [5].

not practically have a complete indemnity from the second defendant. As I found in the principal judgment, the second defendant was wrong in declining to indemnify the first defendant in respect of its liability to the plaintiffs. A consequence of that is that the first defendant now has an exposure to a costs order which it would not have had if the second defendant had accepted its obligation to indemnify the first defendant. In the circumstances of this case, I consider it appropriate to declare that the second defendant is liable to indemnify the first defendant in respect of the costs ordered in favour of the plaintiffs, and further to make a direction to the effect that the plaintiffs must exhaust their avenues of recovery of costs against the second defendant before having recourse against the first defendant.

[14] As to the first defendant's own costs of defending the proceeding brought by the plaintiffs, it seems to me that the second defendant ought also pay these on the indemnity basis. The second defendant wrongfully repudiated its obligation to indemnify the first defendant in respect of the plaintiffs' claims and the first defendant was therefore compelled to incur the costs of defending the matter himself. Like Ambrose J in *Scrase v Jarvis*<sup>2</sup>, I consider that these constitute sufficient special circumstances to warrant an order for indemnity costs.

[15] There will be the following orders and directions:

- (1) The defendants shall pay the plaintiffs' costs of and incidental to this proceeding, such costs to be assessed on the standard basis up to and including 15 April 2016, and thereafter to be assessed on the indemnity basis.
- (2) The second defendant shall pay the first defendant's costs of and incidental to this proceeding (less the sum of \$37,000), such costs to be assessed on the indemnity basis.
- (3) (a) The second defendant is liable to indemnify the first defendant for his liability to the plaintiffs in respect to the costs which are the subject of Order 1.

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<sup>2</sup> Unreported, Supreme Court of Queensland, 21 April 1998.

- (b) Further direct that, in respect of the costs which are the subject of Order 1, the plaintiffs shall exhaust their means of enforcement and recovery against the second defendant before seeking to recover those costs against the first defendant.