SUPREME COURT OF QUEENSLAND

CITATION:	*Mowen v Rockhampton Regional Council* [2018] QSC 44
PARTIES:	**BEVAN ALAN MOWEN** (Plaintiff) **v** **ROCKHAMPTON REGIONAL COUNCIL** (Defendant)
FILE NO/S:	S449/17
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	9 March 2018
DELIVERED AT:	Rockhampton
HEARING DATE:	9 February 2018
JUDGE:	McMeekin J
ORDER:	**Save for the costs of the application for a vexatious proceedings order the plaintiff to pay the costs of the defendant of the proceedings S449/17 and of the applications heard on 27 November 2017 on the standard basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – PARTICULAR CASES – HOPELESS CASE – where solicitors for the defendant had warned the plaintiff in a letter that his action was doomed to failure – where the solicitors for the defendant had informed the plaintiff of the precise basis upon which summary judgment would be sought against him – where a Calderbank offer was made inviting the plaintiff to discontinue his action and in exchange the defendant would bear its own costs – where the plaintiff was advised that if he persisted the defendant would seek indemnity costs – whether the plaintiff should pay the defendant's costs on an indemnity basis *Uniform Civil Procedure Rules* 1999 (Qld) r 171, r 293 *Vexatious Proceedings Act* 2005 (Qld) *Bhagat v Royal and Sun Alliance Life Assurance Australia Ltd* [2000] NSWSC 159, cited *Chaina v Alvaro Homes Pty Ltd* [2008] NSWCA 353, cited

Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) (2005) 13 VR 435 at 442, considered
Howe v Lees (1910) 11 CLR 361, cited
J & D Rigging Pty Ltd v Agripower Australia Ltd & Ors [2014] QCA 23, cited
Macedon Ranges Shire Council v Thompson (2009) 170 LGERA 41, cited
Macintosh v Dun [1908] AC 390, cited
Mizikovsky v Queensland Television Ltd [2013] QCA 68, cited
Papaconstuntinos v Holmes à Court (2012) 249 CLR 534, cited
Quach v Health Care Complaints Commission (No 2) [2015] NSWCA 311, distinguished
Salfinger v Niugini Mining (Australia) Pty Ltd (No 4) [2007] FCA 1594, cited
Spalla v St George Motor Finance (No 8) [2006] FCA 1537, cited
Vink v Tuckwell (No 3) (2008) 67 ACSR 547, cited
Wentworth v Rogers (No 5) (1986) 6 NSWLR 534, cited

COUNSEL: Applicant in person

M Amerena for the respondent

SOLICITORS: Applicant in person

King & Company Solicitors for the respondent

[1] **McMeekin J:** The present application concerns the costs orders that ought to be made in light of my reasons delivered on 20 December 2017.[1] I then dealt with various cross applications. Mr Mowen sought to have certain District Court proceedings transferred to the Supreme Court and to have them "joined" to defamation proceedings pending in this Court (S449/17) so that they be heard together. The Rockhampton Regional Council opposed joinder and cross applied in respect of the defamation proceedings brought against the Council:

(a) For summary judgment pursuant to r 293 *Uniform Civil Procedure Rules* 1999 (Qld);
(b) In the alternative, to strike out all or various parts of the Statement of Claim pursuant to r 171 *Uniform Civil Procedure Rules* 1999 (Qld);
(c) Further and in the alternative, further and better particulars of the Statement of claim;
(d) Various orders under the *Vexatious Proceedings Act* 2005 (Qld).

[2] Mr Mowen was unsuccessful in his various applications. The Council was successful in obtaining summary judgement. I gave the Council leave to apply to have Mr Mowen declared vexatious but declined to make that declaration.

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1 See *Mowen v Rockhampton Regional Council; Bendigo & Adelaide Bank Ltd v Mowen* [2017] QSC 295.

[3] I initially ordered that Mr Mowen pay the defendant's costs save for the vexatious proceedings application. I vacated that order at the request of the Council. The Council contends that save for the costs of their application for vexatious proceedings orders, Mr Mowen should be ordered:

(a) to pay to the defendant its costs of and incidental to this proceeding assessed on indemnity basis; or
(b) alternatively, pay to the defendant its costs of and incidental to this proceeding:
    (i) assessed on a standard basis until 12 October 2017; and
    (ii) after 12 October 2017, assessed on an indemnity basis.

[4] Mr Mowen was not represented and appeared in person.

[5] To understand the timeliness of events the chronology is as follows: the claim was brought on 6 July 2017, served on 25 August 2017, and a defence filed on 20 September 2017. The plaintiff's application was filed on 18 September 2017 and returnable on 25 September 2017. It was adjourned on that date to 27 November 2017 for hearing, the hearing then being expected to take much of the day. The defendant's application was filed on 7 November 2017. Notice was given of the intention to bring the summary judgment application at the hearing on the 25th September.

The defendant's submissions

[6] The defendant submits that costs on the indemnity basis is justified because:

(a) Mr Mowen had an ulterior motive for commencing the proceedings for defamation. It is submitted that he wished to vent his anger at the defendant because it had managed to collect the monies it claimed were owing to it on account of Mr Mowen's outstanding rates and charges. It is submitted that the dominant purpose of commencing this proceeding against the defendant was not in fact to seek reasonable compensation for any loss of reputation or personal hurt, but rather to punish the defendant with an extravagant claim for damages;
(b) Mr Mowen had a propensity to do this as shown by other proceedings;
(c) If he had obtained proper legal advice Mr Mowen would have known that his proceedings were utterly misconceived;
(d) The proceedings were doomed to failure from the start;
(e) The solicitors for the defendant had warned Mr Mowen on 27 September 2017 in a letter written "without prejudice save as to costs" that his action was doomed to failure and had informed him of the precise basis upon which summary judgement would be sought against him in a letter dated 7 November 2017;
(f) A Calderbank offer was made in the letter of 27 September inviting Mr Mowen to discontinue and in exchange the defendant would bear its own costs. Mr Mowen was advised that if he persisted the defendant would seek indemnity costs.

The plaintiff's submissions

[7] Mr Mowen provided written submissions. As in the substantive applications Mr Mowen's submissions are again unresponsive to the points in issue. I have ordered they be sealed up as they again contain scurrilous material. Apart from that, they consist to a large degree of assertions that there is a conspiracy in the judiciary to deny Mr Mowen his rights.

[8] Mr Mowen also appeared and provided oral submissions. They are, in full, as follows:

> MR B.A. MOWEN: Mr McMeekin, I'm only here for five minutes. I told you at the start of things that you had no standing in this matter being heard without a jury or in the presence of a jury. I am preparing documents to be filed with the Crime and Corruption Commission, and they will be served next week. I have much more important things than to sit here and allow you to give my property away to criminals who have no right to it. So good morning to you, Mr McMeekin, and the rest of you criminals.[2]

The principles

[9] The granting of costs on an indemnity basis should be reserved "for unusual cases or cases involving unreasonable conduct" established on "clear grounds": *Mizikovsky v Queensland Television Ltd*[3]; *Chaina v Alvaro Homes Pty Ltd*[4].

[10] Where a party seeks to rely on the alleged imprudent rejection of a *Calderbank* offer the relevant considerations are generally those identified as material by the Victorian Court of Appeal in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)*[5] a decision which has been accepted as authoritative in Queensland in relation to *Calderbank* offers: *J & D Rigging Pty Ltd v Agripower Australia Ltd & Ors*.[6] The matters suggested in *Hazeldene's Chicken Farm* were:

> (a) the stage of the proceeding at which the offer was received;
> (b) the time allowed to the offeree to consider the offer;
> (c) the extent of the compromise offered;
> (d) the offeree's prospects of success, assessed as at the date of the offer;
> (e) the clarity with which the terms of the offer were expressed;
> (f) whether the offer foreshadowed an application for an indemnity costs in the event of the offeree's rejecting it.

[11] Special considerations seem to apply to indemnity costs orders against litigants in person: *Macedon Ranges Shire Council v Thompson*;[7] *Wentworth v Rogers (No 5)*;[8] *Bhagat v Royal and Sun Alliance Life Assurance Australia Ltd*.[9] Some cases speak of a reluctance to make such orders: *Spalla v St George Motor Finance (No 8)*.[10]

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2 T1-2/4-10.
3 [2013] QCA 68.
4 [2008] NSWCA 353 at [113].
5 (2005) 13 VR 435 at 442 [25].
6 [2014] QCA 23 at [6].
7 (2009) 170 LGERA 41.
8 (1986) 6 NSWLR 534.
9 [2000] NSWSC 159.
10 [2006] FCA 1537 at [26].

[12] The concern is to ensure that a litigant in person does not lose out because of a lack of expertise: see the observations of Hodgson CJ in Eq in *Bhagat.*[11] The point perhaps is more that a person who lacks the financial means to employ lawyers with appropriate expertise should not be penalised. The balancing consideration is that such litigants can cause others great hardship and expense. Fraudulent or unreasonable behaviour would overshadow any such limitations: see *Salfinger v Niugini Mining (Australia) Pty Ltd (No 4*)[12] per Heerey J; *Vink v Tuckwell (No 3)*[13] per Robson J approved in *Macedon Ranges Shire Council v Thompson*.[14]

[13] Of relevance to the defendant's arguments here are the observations of Meagher JA in *Quach v Health Care Complaints Commission (No 2)*:[15]

> "This Court has made orders against litigants in person for the payment of indemnity costs where their proceedings were 'obviously doomed to fail' and the litigant maintained the proceedings after having been informed of that fact, or of a procedural defect in the formulation of their claim: *Reimers v Health Care Complaints Commission* [2013] NSWCA 366 at [23] per Barrett JA (Macfarlan and Meagher JJA agreeing). See also *Martin v State of New South Wales* (No 6) [2011] NSWCA 281 at [8]."

[14] There the advice ignored by the litigant had come from the Registrar of the Court of Appeal and a the solicitor acting for the Commission and was to the effect that the Court may not make orders of the kind sought by him under s 69 of the *Supreme Court Act* 1970 (NSW), where a statutory right of appeal exists and has not been pursued. Meagher JA concluded:[16]

> "Whilst the decision of the Practitioner to file the notices of motion might have been excused on account of his lack of legal expertise, no such allowance should be made after their difficulties were brought to his attention in June 2015. Notwithstanding the matters raised with him, the Practitioner persevered. In these circumstances, his conduct meets the description of the type of delinquency said to justify an order for the payment of costs on an indemnity basis: *Oshlack v Richmond River Council* [1998] HCA 11; 193 CLR 72 at [44]."

Discussion

[15] The *Hazeldene's Chicken Farm* considerations favour the defendant. The Calderbank offer of 27 September was a timely one, made two months before the hearing. While the successful summary judgment application was then yet to be filed the facts were not in doubt and did not change between the date of the offer and the hearing. The effect of the compromise was limited as indeed it would always be in such circumstances – a wholly successful defendant cannot give up much more than their right to a costs order. Mr Mowen was advised that the defendant would seek indemnity costs if the offer was not accepted.

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11 At [13].
12 [2007] FCA 1594 at [7].
13 (2008) 67 ACSR 547 at 566 [105]-[107].
14 (2009) 170 LGERA 41.
15 [2015] NSWCA 311 at [10].
16 At [11].

[16] Mr Mowen was advised of the precise ground on which summary judgment was eventually obtained. However the facts here are to be distinguished from those in *Quach v Health Care Complaints Commission (No 2)* given that the source of the advice here was not a source that Mr Mowen had any reason to trust. I do not mean to assert that the solicitors were not in fact trustworthy, but rather to reflect on Mr Mowen's probable perception of the confidence he could place in the advice emanating from the opposing side's solicitors.

[17] There is some basis for thinking that Mr Mowen's motivations were not truly to seek compensation for injured reputation but rather to put the Council to trouble and expense in defending a suit. The alleged defamation was in informing the Bank that Mr Mowen owed certain rates and charges to the Council. His complaint is not that the assertion was false because he had paid the rates and charges but that because of his status as an invalid pensioner he was entitled to a rebate which he was not afforded, the precise extent of which was not made clear. That an invalid pensioner might be unable or unwilling to pay their rates would not, I suspect, cause many bank officers to think poorly of that person's reputation. If there was any damage to Mr Mowen's reputation it could only have been modest. The prime reason for doubting the motivation for the suit lies in the several actions that have been launched for defamation that plainly have that "get square" motivation to them. I have discussed those proceedings in the substantive reasons. There is also the threat to sue council officers contained in the letter detailed at [112] of the substantive reasons.

[18] Thus there are several reasons for thinking that an order on the indemnity basis would be appropriate.

[19] The prime reason for doubting that such an order ought to be made lies in the difficulties inherent in this area of the law. What is involved here is the dissemination of information concerning the creditworthiness of an individual. In the substantive reasons I pointed out that the limits on dissemination of such information are not defined[17] and noted the differing views between the Privy Council and the High Court in similar factual situations exemplified in comparing the outcomes in *Macintosh v Dun*[18] and *Howe v Lees.*[19] The intervening years have not made the distinctions much clearer. I also noted that significant differences of view were expressed in *Papaconstuntinos v Holmes à Court*[20] as to the proposition that voluntary communications were privileged only if there was some pressing need that they be made. A litigant is quite entitled to bring a case hoping to persuade the High Court that their decision on a controversial point determined in an earlier case was wrong. Litigants are also entitled to explore where the boundaries of principle might be drawn in a new fact situation. In neither case is there that element of delinquency needed to justify an order for the imposition of indemnity costs.

[20] On balance I am not persuaded that I should order that the costs be on the indemnity basis. The concerns about Mr Mowen's true motivations cannot, in my judgment, overcome the fact that the principles that apply are not clear cut, that

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17 See *Mowen v Rockhampton Regional Council; Bendigo & Adelaide Bank Ltd v Mowen* [2017] QSC 295 [60]-[62].

18 [1908] AC 390.

19 (1910) 11 CLR 361.

20 (2012) 249 CLR 534 at pages 545-546.

litigants should not be deterred from bringing suit if they do have a genuine sense of grievance, and the somewhat special tenderness shown litigants in person.

[21] Nonetheless costs should follow the event.

Conclusion

[22] Save for the costs of the application for a vexatious proceedings order I order Mr Mowen to pay the costs of the Council of the proceedings and of the applications heard on 27 November 2017 on the standard basis.