SUPREME COURT OF QUEENSLAND

CITATION:	*Wilson v Angseesing & Anor* [2018] QSC 61
PARTIES:	**ZACHARY GEORGE WILSON, a person under a legal incapacity, by his Litigation Guardian, RACHAEL REBECCA WILSON** (plaintiff) **v** **EMILY-JANE ANGSEESING** (first defendant) **RACQ INSURANCE LIMITED** ABN 50 009 704 152) (second defendant)
FILE NO/S:	BS No 7634 of 2014
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers 19 March 2018
JUDGE:	Douglas J
ORDER:	**1. The Certificate of Assessment dated 8 November 2017 filed on 16 November 2017 be varied as follows:** **(a) By increasing the Certificate of Assessment by $3,670.85 in light of the review allowing the following items that were disallowed: 170-171, 337-338, 355-356, 417-418, 709-710, 749-750, 775-776, 858-859, 1051-1052, 1205- 1206, 1249-1250, 1289-1290, 1331-1332, 1682-1683, 1768-1769, 1815- 1816, 2392-2393, 2453-2454, 2577-2578, 2811-2812 and 2940-2941.** **(b) By increasing the Certificate of Assessment by $917.70 in light of care and consideration allowed on subparagraph 1(a) at 25% for item number 3465.**

(c) By increasing paragraph 3(b) disbursements by $20,460.00 in light of the review allowing the following items: 1362, 2809, 2947, 2968, 3162, 3344 and 3357.

(d) By increasing the disbursements in 3(b) by $8,653.00 in the disallowance of paragraph 5 of the Certificate.

(e) By increasing the disbursements paid by $9,020.00 being the Costs Assessor's fees in paragraph 4 paid by the Plaintiff and now payable by the Second Defendant.

2. Otherwise the Application for review be dismissed.

3. The Second Defendant pay:

(a) the Plaintiff's costs of the assessment on a standard basis from 19 June 2017;

(b) Two-thirds of the Plaintiff's costs of the application for review on a standard basis.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – OFFERS OF COMPROMISE, PAYMENTS INTO COURT AND SETTLEMENTS – INFORMAL OFFERS AND CALDERBANK LETTERS – UNREASONABLE REFUSAL OF OFFER – where main action was settled – where second defendant agreed to pay plaintiff's costs – where plaintiff offered for second defendant to pay $235,000 – where second defendant rejected offer – where plaintiff's costs assessed by cost assessor as $211,230.10 – where plaintiff sought review of costs assessment – where plaintiff's costs after review were $245,278.65 – whether plaintiff entitled to costs on indemnity basis as a result of review

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – GENERAL PRINCIPLES

AND EXERCISE OF DISCRETION – where plaintiff sought review of costs assessment – where plaintiff's application for review successful – to what extent second defendant should pay plaintiff's costs of review

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INTEREST ON COSTS – where plaintiff sought review of costs assessment – where plaintiff's application for review was successful – whether plaintiff was entitled to interest on increase in costs assessment

Civil Proceedings Act 2011, s 58, s 59(4)(d)
Legal Profession Act 2007, s 342(2)(b)

COUNSEL: M P Williams for the plaintiff
G J Robinson for the second defendant

SOLICITORS: McInnes Wilson Lawyers for the plaintiff
Quinlan Miller & Treston for the second defendant

[1] On 14 March 2018 I varied a certificate of assessment of costs in this matter. A costs assessor had certified that the costs recoverable by the plaintiff were $202,577.10. As a result of my decisions the parties are agreed on the terms in which the certificate of assessment should be varied but disagree in respect of what order should be made for the plaintiff's costs of the proceeding and of the application to this court.

Competing offers to settle the costs

[2] The controversy arose because of the existence of offers between the parties to settle the amount recoverable as costs. The amount sought by the plaintiff in its bill of costs dated 13 April 2017 was $290,359.93. The second defendant made an offer on 9 May 2017 to settle the costs in the sum of $230,000. In an assessment dated 8 November 2017 the costs assessor assessed the plaintiff's costs as at the date of the second defendant's offer at $211,230.10. The assessor, having found the second defendant's offer was successful, ordered the plaintiff to pay the costs of the assessment of $8,653 reducing the amount payable to $202,577.10.

[3] The plaintiff had made what it characterised as a *Calderbank* offer on 19 June 2017 of $235,000. The offer was of a lump sum of $235,000 in full and final settlement of the standard costs and outlays pursuant to the order sanctioning the settlement of the action by Justice Applegarth dated 14 March 2017. The letter also said that the plaintiff would be seeking indemnity costs in the event that the second defendant rejected the offer and the assessment of costs was more favourable than $235,000.

[4] On the review before me the items disallowed by the assessor were challenged to the extent of $42,165.51 of which I allowed items totalling $25,048.55. The plaintiff therefore contends that it has succeeded in bettering its offer because the standard costs

payable by the second defendant to the plaintiff are now $245,298.65, apparently including the costs assessor's fees at $9,020 which should now be paid by the second defendant rather than the plaintiff. The second defendant contended that the plaintiff succeeded in increasing the amount to be allowed to $236,278.65 but I infer that does not include that figure of $9,020.

Are *Calderbank* offers appropriate for a party entitled to payment of costs?

[5] Mr Robinson for the second defendant argued that it was inappropriate to rely upon *Calderbank* offers in the context of offers to settle costs. He submitted that the terms of r 733 of the *Uniform Civil Procedure Rules* 1999 relating to offers to settle costs only applied to a party liable to pay costs rather than, as here, the plaintiff as the party entitled to payment of the costs. No provision is made by the rules for a party entitled to the costs to be able to make an offer to settle them. He submitted that the policy rationale for that was to encourage legal practitioners to prepare bills of costs in accordance with the statement in Form 60A of the rules which requires them as officers of the court to say that they believe the costs claimed are not excessive or extravagant but are reasonable and that the disbursements were incurred reasonably.

[6] He referred to authorities dealing with taxation of bills between solicitor and client to the effect that once a bill of costs has been challenged by the client it cannot be amended and, if, on assessment, the bill was reduced by the amount of 15% pursuant to the s 342(2)(b) of the *Legal Profession Act* 2007 the solicitor would be ordered to pay the costs of taxation. The reasoning of the courts in those cases was that the client should be protected from circumstances where solicitors delivered a somewhat inflated bill but then sought to avoid the possible consequences of having it reduced by more than 15% on assessment by making amendments to the costs statement to reduce it before the assessment began. He submitted that, as a matter of doing justice, the court should be no slower to protect parties liable to pay costs in civil litigation from the consequences of inflated costs statements. Accordingly, he submitted that it would offend that principle to allow, by the back door by means of a *Calderbank* letter of offer, that which was unavailable by the front door by means of an offer under r 733.

[7] In the alternative, he submitted that at the date of the offer the second defendant was justified in being confident of its prospects of success. That argument relied on hindsight to some extent because of the success that the second defendant enjoyed before the costs assessor.

[8] I do not need to resolve the legal issue whether it is appropriate to rely on *Calderbank* offers in this context.

Should indemnity costs be awarded in any event?

[9] What seems to me to be significant here is that the plaintiff's application for review was not wholly successful where the parties' respective offers were not far apart.

[10] Mr Robinson assessed the plaintiff's success monetarily by submitting that he secured an improvement of $25,048.55 when items to the value of $44,367.51 were sought to be reviewed. When one reviews my reasons, it is apparent that the plaintiff succeeded in some areas and failed in others. There were particular items on which it succeeded, such as the costs of two counsel and the costs of summaries prepared by the solicitors from consultations with their client and witnesses. They were significant items. Nonetheless, however, there were other areas where the plaintiff's submissions were not successful.

[11] In the circumstances, it does not seem to me to be appropriate, given the limited extent of the plaintiff's success, to treat the second defendant as having unreasonably rejected the offer. In that context, it is appropriate to point out that the second defendant's offer to settle of $230,000 was also very close to the figure finally achieved. Where the respective offers were only $5,000 apart it seems surprising that the parties continued to litigate the issue of costs. Accordingly, I shall not make any order for indemnity costs.

The plaintiff's costs of the application

[12] The second defendant argued, however, that the plaintiff should only be entitled to 12% of its costs of the application for review on a standard basis having regard to the success it enjoyed on the hearing. The second defendant's submissions were that if the plaintiff had succeeded as to 100% in its application for review, he should have received 100% of his costs and that if he had succeeded as to 50% the appropriate order would be that each side bear his or its own costs. By Mr Robinson's calculation that the plaintiff had succeeded in securing an improvement over the initial assessment of the costs assessor of $25,048.55 of the items sought to be reviewed of $44,367.51 or 56%, he submitted that justice would be done by ordering the second defendant to pay 12% of the plaintiff's costs of the application for review.

[13] That approach seems to me to be rather artificial. Bearing in mind the degree of success on some of the major issues by the plaintiff as well as its monetary success overall, it is my view that the second defendant should pay two-thirds of the plaintiff's costs of the application for review on the standard basis.

Is interest payable on the increase in the costs assessed?

[14] The plaintiff also argued that it was entitled to interest on the increase of the costs assessment on the basis that, if the costs assessor had not erred in his discretion, the plaintiff would have had the benefit of the sum of money increased on the review so that interest should be awarded on the amount as varied from the date of the original judgment.

[15] In arguing that, Mr Williams sought to rely upon a decision of the Court of Appeal in *Keeley v Horton*[1] dealing with the variation of an amount of damages on appeal and the

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[1] [2016] QCA 253.

right to interest pursuant to s 58 and s 59 of the *Civil Proceedings Act* 2011. Section 58 permits interest to be included in relation to a proceeding in a court for the payment of money, including a proceeding for debt, damages or the value of goods. *Keeley v Horton* was a case where an amount of nominal damages had been varied on appeal and the Court of Appeal permitted interest pursuant to that section to be made payable from the date when the cause of action arose to the date of judgment in the court below. Mr Williams submitted, therefore, that interest should be awarded on the amount varied here from the date of the original judgment.

[16] Mr Robinson's submission to the contrary was based on the particular provision in s 59(4)(d). It provides that if a money order includes an amount for costs and the costs are paid within 21 days after assessment, interest on the costs is not payable unless the court otherwise orders. This specific provision seems to me to apply here. In other words, interest is not normally payable on the costs if the money order including the costs is paid within 21 days after assessment. As Mr Robinson submitted, interest will then be payable if the costs based on the order as varied by me are not paid within 21 days of my order.

[17] I see no compelling reason in this case to order otherwise. The issues debated before me were fairly arguable and should not be characterised as some form of tactic, for example, to delay the plaintiff's receipt of his costs unfairly. The determination below was one of an independent costs assessor. Accordingly, it is my view that the plaintiff has no entitlement to interest on the increase in costs ordered by me.

Order

[18] Accordingly, I shall make an order in terms of the draft which I have placed with the file.