

SUPREME COURT OF QUEENSLAND

CITATION: *Linville Holdings Pty Ltd v Fraser Coast Regional Council (No 2)* [2018] QSC 62

PARTIES: **LINVILLE HOLDINGS PTY LTD ACN 009 944 325**
(applicant)
v
FRASER COAST REGIONAL COUNCIL
(respondent)

FILE NO/S: SC No 12922 of 2016

DIVISION: Trial Division

PROCEEDING: Application for costs

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 27 March 2018

DELIVERED AT: Brisbane

HEARING DATE: Written submissions

JUDGE: Jackson J

ORDER: **The respondent pay the applicant's costs of the proceeding to be assessed on the 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 Calderbank offer made and refused – where questions in proceeding are matters of public importance – whether costs should be assessed on the indemnity basis

Civil Proceedings Act 2011 (Qld), s 15
Uniform Civil Procedure Rules 1999 (Qld), rr 681, 703

Calderbank v Calderbank [1975] 3 All ER 333, cited
Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) (2005) 13 VR 435, cited
J & D Rigging Pty Ltd v Agripower Australia Ltd [2014] QCA 23, cited
Jojeni Investments Pty Ltd v Mosman Municipal Council (No 2) [2015] NSWCA 208, cited
Oshlack v Richmond River Council (1998) 193 CLR 72, cited
Tamworth Regional Council v Hanson [2016] NSWSC 1334, cited

COUNSEL: J Hastie for the applicant
N Shaw for the respondent

SOLICITORS: DJ Hinton Lawyers for the applicant
CLH Lawyers for the respondent

- [1] On 6 November 2017, I gave judgment in the proceeding declaring that for each of the financial years ending 30 June 2015, 30 June 2016 and 30 June 2017 the respondent failed to validly make and levy rates and charges within its local government area because it did not decide by resolution at its budget meeting for that year what rates and charges were to be levied as required by s 94(2) of the *Local Government Act 2009* (Qld).¹
- [2] The applicant applies for an order for costs of the proceeding,² to be assessed on the indemnity basis.³
- [3] The basis of the application is that on 23 March 2017, the applicant made an offer to compromise the proceeding without prejudice except as to costs on the terms that:
1. the applicant's obligations to pay the rates and charges the subject of the Magistrates Court proceeding, including any interest, be waived;
 2. the Magistrates Court proceedings be discontinued on the basis each party bears their own costs; and
 3. the Supreme Court application be withdrawn on the basis each party bears their own costs.
- [4] The respondent did not accept the offer.
- [5] The applicant relies on the principle in *Calderbank v Calderbank*⁴ as justifying an order that costs be assessed on the indemnity basis. In *J & D Rigging Pty Ltd v Agripower Australia Ltd*, the Court of Appeal observed:
- “The failure to accept a *Calderbank* offer is a matter to which a court should have regard when considering whether to order indemnity costs. The refusal of an offer to compromise does not warrant the exercise of the discretion to award indemnity costs. The critical question is whether the rejection of the offer was unreasonable in the circumstances. The party seeking costs on an indemnity basis must show that the [other] party acted ‘unreasonably or imprudently’ in not accepting the *Calderbank* offer.”⁵ (footnotes omitted)

¹ *Linville Holdings Pty Ltd v Fraser Coast Regional Council* [2017] QSC 252.

² *Civil Proceedings Act 2011* (Qld), s 15; *Uniform Civil Procedure Rules 1999* (Qld), r 681(1).

³ *Uniform Civil Procedure Rules 1999* (Qld), r 703.

⁴ [1975] 3 All ER 333.

⁵ [2014] QCA 23, [5].

- [6] The case law has developed a number of relevant considerations that may be taken into account in considering whether or not the refusal of a *Calderbank* offer is unreasonable or imprudent.⁶ It is unnecessary in the circumstances of this case to discuss them in any general way. The focus may be confined to the relevant factors in the present case.
- [7] First, there is no dispute that the proceeding in the present case was not one to which the “offer to settle” provisions of Ch 9 Pt 5 of the *Uniform Civil Procedure Rules 1999* (Qld) apply, because the proceeding was brought by originating application claiming declaratory relief.
- [8] Second, an unusual feature of the present case is that the *Calderbank* offer of compromise required that the respondent compromise both the present proceeding and the related proceeding in the Magistrates Court brought by the respondent to recover the rates and charges alleged to have been due and owing by the applicant for the relevant years. Although that was unusual, if the respondent agreed to waive those rates and charges in order to make the declarations sought in the present proceeding unnecessary, it was not unreasonable for the applicant to propose the settlement of the Magistrates Court on similar terms.
- [9] Third, the respondent considered that it may not have had power to enter into a contract by which it agreed to waive rates and charges that were payable or may have been payable depending on the validity of the resolutions passed to levy those rates and charges. The applicant contends that the respondent had such power, relying on *Tamworth Regional Council v Hanson*.⁷ But the consideration of the question in that case was obiter dictum and, in any event, related to the relevant legislation in New South Wales. As well, if the respondent had agreed to waive the rates and charges that would have been due by the applicant for the relevant years, a question must have arisen as to whether it was appropriate to maintain any demands for the rates and charges payable by other ratepayers. In my view, it was a legitimate consideration for the respondent to take into account that the course proposed by the applicant would have favoured the applicant over other ratepayers, purely because the applicant was prepared to challenge the validity of the relevant resolutions.
- [10] Fourth, the respondent took into account the possibility that even if the resolutions relied upon to levy the rates and charges were invalid, a further resolution or resolutions might be made to cure the defect. The applicant submits that no such resolution would be valid because it would be made contrary to s 94(2) of the *Local Government Act 2009* (Qld). But that is a question not decided in the current proceeding and which, in my view, it is not appropriate to decide for the purposes of resolving the question of costs only.
- [11] In any event, a further resolution or resolutions by the respondent was not the only means by which the declared invalidity of the rates and charges for the relevant years could be cured. Another possibility was retrospective legislation. That possibility is

⁶ For example, see *Hazeldene’s Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435.

⁷ [2016] NSWSC 1334.

about to be realised.⁸ The subject matter in question is the raising of taxation to meet the costs of the respondent performing its statutory functions as a local government in the public interest under the *Local Government Act 2009* (Qld).

- [12] Fifth, although the issues determined by the declaration made in the current proceeding are binding only between the applicant and the respondent, it is true to say that the determination of the questions raised in the proceeding included matters of public importance⁹ that have an impact beyond the extent of the strict res judicata or issue estoppels that may arise from the judgment. In my view, the validity of the resolutions by which the respondent had levied rates and charges for the relevant years was a matter which the respondent not unreasonably sought to have resolved by judgment. Surprisingly, the applicant submits that the respondent's failure to accept the offer was unreasonable because it exposed the collection of the rates for the relevant years to general invalidity. In my view, that was a point that made it not unreasonable for the respondent, charged under the *Local Government Act 2009* (Qld) with the responsibility to validly fix the rates and to collect them from the persons liable to pay them, to ascertain by judgment whether the challenge to the validity of its processes was a good or bad challenge.
- [13] Sixth, the applicant sought to characterise the respondent's resistance of the application as unreasonable because the applicant always contended that the resolutions were invalid on the ground on which it succeeded. This point is not a clear one. The applicant did not raise the relevant ground in its primary submissions, as is recorded in the reasons for judgment. The applicant submits that in earlier correspondence, it contended that "it was necessary for [the respondent] to have passed specific resolutions levying each rate and charge it wished to levy for that financial year".¹⁰ This contention is not strictly the point on which the applicant succeeded, because it was not found that there must be a separate or specific resolution for each rate or charge.
- [14] Having regard to these factors, in my view, the respondent's failure to accept the applicant's *Calderbank* offer was not unreasonable.
- [15] It follows that while an order should be made that the respondent pay the applicant's costs of the proceeding, on the ground that it is appropriate to make an order for costs under the statutory power to do so and that the usual order should be made that costs follow the event, the costs should not be ordered to be assessed on the indemnity basis.

⁸ Local Government Legislation (Validation of Rates and Charges) Amendment Bill 2018 (Qld), which passed the Legislative Assembly on 20 March 2018 and is awaiting Royal Assent.

⁹ *Oshlack v Richmond River Council* (1998) 193 CLR 72, 89 [42]-[44], 123-4 [136]-[137]; cf *Jojeni Investments Pty Ltd v Mosman Municipal Council (No 2)* [2015] NSWCA 208, [19].

¹⁰ This contention does not appear in the letter from DJ Hinton Lawyers to CLH Lawyers dated 26 October 2016 as the applicant's submissions on costs stated. However, I assume it appeared in another letter.