SUPREME COURT OF QUEENSLAND

CITATION:	*Wiesac Pty Ltd & Anor v Insurance Australia Limited (No 2)* [2018] QSC 171
PARTIES:	**WIESAC PTY LTD** (first plaintiff) **MURPHYSCHMIDT SOLICITORS (A FIRM)** (second plaintiff) **v** **INSURANCE AUSTRALIA LIMITED** **ABN 11 000 016 722** (defendant)
FILE NO:	BS No 538 of 2015
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	9 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	Decided on the papers
JUDGE:	Davis J
ORDER:	**1. The plaintiffs pay the defendant's costs of the proceedings on the standard basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – OFFERS OF COMPROMISE, PAYMENTS INTO COURT AND SETTLEMENTS – INFORMAL OFFERS AND CALDERBANK LETTERS – UNREASONABLE REFUSAL OF OFFER – where the successful party made two offers of which one was a *Calderbank* letter – where the matters raised by the successful party in offers were consistent with matters found in its favour at trial – whether the non-acceptance of the offer was unreasonable – whether indemnity costs should be awarded *Uniform Civil Procedure Rules* 1999 (Qld) r 361 *Calderbank v Calderbank* [1975] 3 All ER 33, cited *Kozak v Matthews* [2007] QSC 204, cited *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] VSCA 298, cited *J & D Rigging Pty Ltd v Agripower Australia Ltd* [2014]

QCA 23, cited
Rickard Constructions v Rickard Hils Moretti & Ors [2005] NSWSC 481, cited
Wiesac Pty Ltd & Anor v Insurance Australia Ltd [2018] QSC 123, cited

COUNSEL: R Ashton QC for the plaintiffs
P L O'Shea QC and D W Williams for the defendant

SOLICITORS: Synkronos Legal for the plaintiffs
Carter Newell for the defendant

[1] On 1 June 2018, I dismissed the plaintiffs' claims[1], and upon doing so I called for written submissions on costs. Written submissions have been received from all parties and all parties are content for me to determine the costs question without oral argument.

[2] The plaintiffs concede that they must pay the defendant's costs of the proceedings but submit that they should do so on the standard basis. The defendant seeks an order for the costs of the proceedings on the standard basis up to 1 June 2016 and thereafter on an indemnity basis which it says is justified as the plaintiffs did not accept offers of settlement made on that day. The offers were more favourable to the plaintiffs than what was achieved by them at trial.

History of the proceedings

[3] The first plaintiff is a company controlled by members of the second plaintiff, a firm of solicitors. It owns a building in Mary Street, Brisbane from which the second plaintiff conducts a legal practice. In the 2011 Brisbane floods, the building was inundated with water, damaging fixtures and fittings and disrupting the second plaintiff's practice. Both plaintiffs made claim under an insurance policy held by them with the defendant.

[4] By the time of the trial, the mechanism of the inundation of the building was largely non-contentious as between the hydrologists who were called to give evidence. As water levels rose in the Brisbane River, water backed up in the stormwater pipes near the building. Water under pressure was then forced from the pipes into the subterranean

---

[1] *Wiesac Pty Ltd & Anor v Insurance Australia Ltd* [2018] QSC 123 (the principal judgment).

soils adjacent to the building and then ultimately into the basement. What disagreement there was between the hydrologists was all but irrelevant to the issues at the trial.[2]

[5] Several heads of damage claimed by the plaintiffs were disputed by the defendant, who also relied upon an exclusion in the policy. Some heads of damage were not proved, but I assessed the sums payable, subject to the exclusion clause as:

1. To the first plaintiff: $131,192.04;

2. To the second plaintiff: $652,668.26.

[6] I held, however, that the flood exclusion operated to defeat the plaintiffs' claims.

The offers

[7] Two offers were made by the defendant on 1 June 2016 to settle the plaintiffs' claims. One of the offers (which I'll call the first offer)[3] was made under Chapter 9 Part 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) (*UCPR*). The defendant offered to pay each plaintiff $50,000 together with their costs on the standard basis. That offer was expressed to be available for acceptance within 14 days of it being made.

[8] Rule 361 of the *UCPR* provides:

> "**361 Costs if offer by defendant**
>
> (1) This rule applies if –
>
> (a) the defendant makes an offer that is not accepted by the plaintiff and the plaintiff does not obtain an order that is more favourable to the plaintiff than the offer; and
>
> (b) the court is satisfied that the defendant was at all material times willing and able to carry out what was proposed in the offer.
>
> (2) Unless a party shows another order for costs is appropriate in the circumstances the court must –

---

[2] Principal judgment at [36]–[40].

[3] The two offers were made simultaneously.

(a) order the defendant to pay the plaintiff's costs, calculated on the standard basis, up to and including the day of service of the offer; and

(b) order the plaintiff to pay the defendant's costs, calculated on the standard basis, after the day of service of the offer.

(3) However, if the defendant's offer is served on the first day or a later day of the trial or hearing of the proceeding then, unless the court otherwise orders –

(a) the plaintiff is entitled to costs on the standard basis to the opening of the court on the next day of the trial; and

(b) the defendant is entitled to the defendant's costs incurred after the opening of the court on that day on the indemnity basis.

(4) If the defendant makes more than 1 offer satisfying subrule (1), the first of those offers is taken to be the only offer for this rule."

[9] The *UCPR* does not operate so as to give the defendant a claim to indemnity costs. The rules only operate to relieve a defendant from payment of costs and obtain costs on a standard basis. The first offer though can be considered relevantly to the *Calderbank* principles.[4]

[10] The other offer made on 1 June 2016 was contained in a letter from the defendant's solicitors and was expressed to be a *Calderbank* offer. By that letter, the defendant offered to pay the plaintiffs a total of $250,000 in discharge of all claims including costs. The second offer was open for acceptance within 14 days.

[11] Importantly to the defendant's submission for indemnity costs, it was said in the letter whereby the second offer was made:

> "The Plaintiffs reliance on the decision of *LMT Surgical v Allianz Australia Insurance Ltd* [2013] QSC 181 is ill-founded and amongst other matters does not take into account the fundamental difference in the policy wording(s) that exist between *LMT* and the present matter. These differences have been clearly communicated to the Plaintiffs, and the Defendant considers that its approach to the flood exclusion in these particular circumstances is strongly supported by well known and established case law."

---

[4] *Calderbank v Calderbank* [1975] 3 All ER 33 and *Kozak v Matthews* [2007] QSC 204 at [4].

The letter then referred to a number of reported decisions.[5]

[12] The passage from the defendant's solicitors' letter relates to the flood exclusion clause which was in these terms:

> "The Insurer(s) shall not be liable under Sections 1 and/or 2 in respect of:
>
> …
>
> 3. Physical loss, destruction or damage occasioned by or happening through:
>
> (a) flood, which shall mean the inundation of normally dry land by water escaping or released from the normal confines of any natural water course or lake whether or not altered or modified or of any reservoir, canal or dam;
>
> (b) water from or action by the sea, tidal wave or high water:
>
> Provided that Perils Exclusions 3(a) and 3(b) shall not apply if loss, destruction or damage is caused by or arises out of an earthquake or seismological disturbance."

[13] *LMT Surgical Pty Ltd v Allianz Australia Insurance Ltd*[6] (*LMT*) was a decision of Jackson J, who held that damage caused by water which left the river, backed up into stormwater pipes and flowed into a building was not caught by a flood exclusion clause in terms very similar to the one relevant here. The clause considered by Jackson J was in these terms:

> "Physical loss, destruction or damage occasioned by or happening through:
>
> (a) flood, which shall mean the inundation of normally dry land by water overflowing from the normal confines of any natural watercourse or lake (whether or not altered or modified), reservoir, canal or dam."[7]

---

[5] These were *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541; *Max Hams & ors v GGU Insurance* [2002] NSWSC 273; *K Sika Plastics Limited v Cornhill Insurance Co Limited* [1982] 2 NSLR 50; *Eastern Suburbs Leagues Club v Royal & Sun Alliance Australia Limited* [2003] QSC 413; *Elilade Pty Ltd v Nonpareil Pty Ltd* [2002] FCA 909; 124 FCR 1.

[6] [2014] 2 Qd R 118.

[7] At [6].

[14] The reference in the defendant's solicitors' letter[8] to cases such as *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd*[9] and the other cases there mentioned largely concern the concept of "normally dry land". A question arose at trial as to whether the subterranean soils between the pipes and the basement and/or the basement itself was "normally dry land". I found that both the subterranean soils and the basement were "normally dry land" for the purposes of the exclusion[10] and I distinguished *LMT*.[11] The reasons for judgment were therefore consistent with what had been asserted in June 2016 to be the case by the defendant's solicitors in their letter which contained the second offer.

***Calderbank* arguments**

[15] The defendant relies on both offers as *Calderbank* offers. It is common ground that indemnity costs may be ordered if the failure to accept one of the offers was unreasonable. It was, the defendant submits, unreasonable for the plaintiffs to reject both offers. One ought to have been accepted. The defendant points to the failure of the plaintiffs' claims and submits that the claims failed for the very reasons articulated in their letter of 1 June 2016.

[16] By the time of the trial, the experts were in substantial agreement so, the defendant submits, the failure to accept one of the offers was through a misunderstanding of the legal effect of the flood exclusion. In those circumstances, the defendant submits that the failure to accept one of the offers was unreasonable.

[17] The offers were much more favourable to the plaintiffs than the plaintiffs achieved at trial. In those circumstances, as explained in *Stewart v Atco Contracts Pty Ltd (in liq) (No 2)*[12]:

---

8 By footnote to the letter.

9 (1991) 25 NSWLR 541.

10 Principal judgment at [81]–[93].

11 Principal judgment at [102]–[106].

12 (2014) 252 CLR 331 at [4].

> "The non-acceptance of a *Calderbank* offer is a factor, in some cases a strong factor, to be taken into account on an application for indemnity costs. The respondent submits that its rejection of the offer was not unreasonable. If that be the test, it would appear to require at the least that the respondent point to a reason for not accepting the offer beyond the usual prospects of being successful in litigation."

[18] Ultimately, though, the issue as to whether the failure to accept one of the offers was unreasonable is judged at the time the offer was to be accepted. That involves a consideration of all the circumstances then pertaining, including the point the proceedings had then reached, and any assessment of prospects on material then available. [13]

[19] Both offers were made after the parties had been unable to settle the case in mediation. At the time of the mediation, the plaintiffs relied on a report of a hydrologist, Mr Winders. Mr Winders had expressed the opinion that the pipes had surcharged from the flow of stormwater. That opinion potentially impacted upon the operation of the flood exclusion. In their letter of 1 June 2016, the defendant's solicitors were highly critical of the views that had been expressed by Mr Winders. The plaintiffs sought an opinion from another hydrologist. That, in the circumstances, was a reasonable thing to do. Ultimately, the further expert hydrological evidence did not help them, but that is somewhat beside the point.

[20] The defendant's solicitors, in their letter of 1 June 2016 did, no doubt, accurately predict the way the Court would construe the flood exclusion. However, the construction of the clause was not free from difficulty. The fact that after a trial involving full legal argument on behalf of both parties, the defendant's position was vindicated does not mean that the rejection of both offers was necessarily unreasonable.[14]

[21] As already observed, I distinguished *LMT*. Jackson J held that "water overflowing from the natural confines [of the river]" referred to water flowing over the banks. I held that "water escaping from the natural confines [of the river]" would include not only water

---

[13] *J & D Rigging Pty Ltd v Agripower Australia Ltd* [2014] QCA 23 at [5]–[6]; *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] VSCA 298 at [25].

[14] *Rickard Constructions v Rickard Hils Moretti & Ors* [2005] NSWSC 481 at [28].

escaping over the banks of the river but water leaving the river by backing up through the pipes. The plaintiffs' reliance upon the decision of Jackson J ultimately may have been determined to be wrong, but given that the clauses were all but identical, that reliance could hardly be said to be unreasonable in the context of doubt (as at the time of the offers) as to the mechanism of the flooding.

[22] In all the circumstances, I do not find that it was unreasonable of the plaintiffs to reject the offers of 1 June 2016. I therefore decline to make an order for costs on the indemnity basis and I order the plaintiffs to pay the defendant's costs of the proceedings on the standard basis.

[23] It was pointed out in the defendant's written submissions that Atkinson J on 5 April 2017 ordered the plaintiffs to pay the defendant's costs associated with an adjournment of the trial on the standard basis. My order as to costs does not affect that order in any way.

[24] THE ORDER OF THE COURT IS THAT:

1. The plaintiffs pay the defendant's costs of the proceedings on the standard basis.