SUPREME COURT OF QUEENSLAND

CITATION:	*Bankier v HAP2 Pty Ltd (No 3)* [2019] QSC 186
PARTIES:	**MICHELLE ANN BANKIER** (plaintiff) **v** **HAP2 PTY LTD** ACN 005 806 744 (defendant)
FILE NO:	BS No 2715 of 2016
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions
JUDGE:	Martin J
ORDER:	**The defendant is to pay the plaintiff's costs of the action assessed on the indemnity basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – where the plaintiff made an offer to settle and the defendant rejected that offer – where the plaintiff's offer was bettered in the judgment – where the defendant asserts that, after the time for accepting the offer had expired, the plaintiff's statement of claim was amended in significant ways – where the defendant contends that the appropriate order is therefore that costs be assessed on the standard basis – whether costs ought to be calculated on the indemnity basis *Uniform Civil Procedure Rules* 1999, r 360 *Castro v Hillery* [2003] 1 Qd R 651, cited *Federal Commissioner of Taxation v Moodie* (2014) FLR 453, cited *Forge v Rewers (No 2)* [2017] ACTSC 273, cited *Leach v The Nominal Defendant (QBE Insurance (Australia) Ltd)*

(No 2) [2014] NSWCA 391, cited

Shaw v Jarldorn (1999) 76 SASR 28, cited

COUNSEL: B Hall for the plaintiff
S Eggins for the defendant

SOLICITORS: Shine Lawyers for the plaintiff
Moray & Agnew Lawyers for the defendant

[1] On 25 July 2019 I gave judgment for the plaintiff in the sum of $719,434.00 with interest.[1]

[2] The plaintiff seeks an order that the defendant pay her costs on the indemnity basis. The defendant resists assessment on that basis.

The offer

[3] On 18 November 2016 the plaintiff made an offer to settle the action pursuant to Chapter 9 Part 5 of the *Uniform Civil Procedure Rules* 1999 (UCPR). The offer was that the defendant pay the plaintiff $600,000 and her costs of the proceeding assessed on the standard basis.

[4] On 21 November 2016 the defendant rejected that offer and offered to settle on the basis that the plaintiff pay 50% of the defendant's assessed costs to that date.

The rule

[5] Rule 360 of the UCPR relevantly provides:

> "(1) If—
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> (a) the plaintiff makes an offer that is not accepted by the defendant and the plaintiff obtains an order no less favourable than the offer; and
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> (b) the court is satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer;
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> the court must order the defendant to pay the plaintiff's costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances."

[6] In the ordinary course, given that the offer was bettered, an order for indemnity costs would follow.

Is another order appropriate in the circumstances?

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[1] See [2019] QSC 101 and [2019] QSC 180.

[7] The defendant contends that the appropriate order is that costs be assessed on the standard basis. It bases that on the contention that, after the time for accepting the offer had expired, the Statement of Claim was amended in significant ways.

[8] The effect of r 360 is that, where an unaccepted offer is bettered in the judgment, then the default position is that the defendant pays the costs on the indemnity basis. To avoid that consequence the onus is on the defendant to demonstrate that another order "is appropriate in the circumstances". Similar rules exist in other jurisdictions and consideration has been given to what a defendant needs to show.

[9] The cognate provision in the District Court Rules of South Australia was examined in *Shaw v Jarldorn*[2] where Doyle CJ said:

> "[4] The power to 'order otherwise' confers upon the Court an unfettered discretion. But it is a discretion which, if exercised, is exercised to displace what will otherwise be the required effect of r 41.04, which is that the defendant pay the whole of the plaintiff's costs of action as between solicitor and client. In other words, **it will be proper for the Court to order otherwise only if, in the exercise of that wide discretion, there is good reason to order that the rule is not to have its usual effect**. In considering whether there is good reason to so order, it is necessary to bear in mind the manner in which the rule operates, and the context in which it operates.
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> …
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> [6] A defendant who does not accept an offer made by a plaintiff will, of necessity, only know after judgment if the defendant was right to fight on rather than to accept the offer. But once again, the rule operates on the premise that if an offer is made by the plaintiff, the defendant will weigh up the advantages and disadvantages of not accepting the offer. **In weighing up those advantages and disadvantages, the defendant must take into account the ordinary risks of litigation**, including the fact that in a damages claim in particular it is usually impossible to predict with any precision the amount of damages that will be awarded. …
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> …
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> [9] All of these points may be said to be fairly obvious. I make them merely to emphasise that while the power to order otherwise is a wide one, it is to be exercised in the context of a rule that operates in the manner that I have identified, and in the context of a process of litigation that necessarily involves risks for each party. Putting it bluntly, once a plaintiff makes an offer that attracts the operation of r 41, the defendant who does not accept that offer accepts the risk of plaintiff bettering the offer, and obtaining an order for the whole of the costs of the action as between solicitor and client. **Having regard to the purpose of the rule and the manner in which it operates, it will only be in limited circumstances that a defendant will be able to demonstrate that it is proper for**

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[2] (1999) 76 SASR 28.

> **the Court to order that the plaintiff should not recover costs as between solicitor and client**." (emphasis added)

[10] Perry J (with whom Doyle CJ and Mullighan J agreed) said:

> "[36] … The circumstances which are most likely to arise and which might justify relieving a defendant from the obligation to pay solicitor and client costs, will be those **where there is such a significant change in the manner in which the plaintiff's case is presented at the trial, or the manner in which the evidence emerges at the trial, that it might fairly be said that the full dimensions of the plaintiff's entitlement could not possibly have been foreseen before the hearing commenced**." (emphasis added)

[11] The state of the plaintiff's case, the disclosure which has taken place, and other information available to the defendant are all matters which may be taken into account. In *Castro v Hillery*[3] the Court of Appeal considered an offer which, in the circumstances, it regarded as not being genuine in that no judge could have sanctioned the figure offered in the light of information which was then available to the respondent but which had not been disclosed to the appellant. Williams JA (with whom M Wilson J agreed) said:

> "[79] … The Offer to Settle procedure is designed to focus attention on early resolution of the dispute. The sanction is with respect to costs. In those circumstances it is not unreasonable to say that the Offer to Settle must be evaluated in the light of circumstances disclosed in the proceedings. **If the plaintiff's case changes substantially after an Offer to Settle is made and declined, the defendant ought not be penalised for rejecting the offer**. If the principle were otherwise the Offer to Settle procedure would be open to abuse." (emphasis added)

[12] The test to be applied in determining whether a defendant has satisfied the court that "another order for costs is appropriate" has been the subject of consideration in a number of cases. In particular, the courts of New South Wales have debated whether it is necessary that a defendant show "exceptional circumstances".[4] In *Leach v The Nominal Defendant (QBE Insurance (Australia) Ltd) (No 2)*[5] McColl JA (with whom Gleeson JA and Sackville AJA agreed) said:

> "[47] An 'exceptional circumstances' test could be seen as a gloss on the language of the relevant rules their text does not admit. That suggestion was discounted by Hely J in relation to the like power to 'otherwise order[s]' in O 23, r 11(4) of the Federal Court Rules 1979 (Cth) (as then in force): *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc (No 2)* [2004] FCA 1437; (2004) 212 ALR 281 (at [17]). Rather, his Honour was of the view that such language merely 'convey[s] that the prima facie position should only be departed from for proper reasons which, in

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[3] [2003] 1 Qd R 651.

[4] See *Federal Commissioner of Taxation v Moodie* (2014) FLR 453, [2014] NSWCA 59 at [64].

[5] [2014] NSWCA 391.

> general, only arise in an exceptional case'. In my view his Honour's observation sufficiently encapsulates the approach to be adopted in the present case."

[13] I respectfully agree with that exposition and also with the way it was put by Mossop J in *Forge v Rewers (No 2)*[6] where his Honour said:

> "[29] The use of an expression such as 'exceptional circumstances' is thus not to be treated as an impermissible gloss on the language but rather a practical explanation of the predicament facing the offeree in the light of the obvious purpose of the Rules to encourage settlement of the proceedings and their structure in so far as they provide a default position which cannot be ignored when exercising that discretion."

Was there a change in the plaintiff's case which justifies departure from the default position?

[14] The defendant argues that changes to the Statement of Claim after the offer was rejected were significant and important. It refers to additions to the pleaded claim such as:

(a) The later amendments made significant and important additions to what the plaintiff alleged a reasonable and prudent financial advisor would do when providing financial advice to a client, including, amongst others:

> "(i) advise or warn the client on the impact of the client's own actions on the ability to implement the financial plan or to achieve the desired lifestyle and financial goals if the client does not follow any budgetary parameters or restrictions upon which the advice is based;
>
> (j) advise or warn the client on the impact of any investment decision which falls outside the advice provided in the financial plan".

(b) An important added claim was that the defendant had breached a duty to give a specific warning that the plaintiff would be unable to pay for her medical expenses if she spent in excess of her budget.

[15] These types of changes were, the defendant says, critical because they constituted the very case advanced by the plaintiff at trial on which she was ultimately successful, i.e., that the defendant was required to give a specific warning to the plaintiff about the effect the plaintiff's spending would have on her capacity to fund her medical expenses.

[16] Other changes included the addition of the plaintiff's alternative claim that the defendant failed to provide a warning pursuant to s 945B of the *Corporations Act* 2001 (Cth). The plaintiff was ultimately successful in respect of this claim.

[17] While those (and other) changes were made to the Statement of Claim they were (apart from the *Corporations Act* claim) refinements of a case which was already in great detail. The

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[6] [2017] ACTSC 273.

plaintiff had, in the version of the Statement of Claim at the time of the offer, pleaded that the defendant:

(a) had failed to advise that the business involved a high degree of risk and loss of capital;

(b) was required to have a frank discussion about maintaining the strategy and adherence to a budget;

(c) failed to explain the long-term risks of spending beyond budget levels and possible failure of the business;

(d) did not dissuade the plaintiff from borrowing to purchase the Palm Beach Property; and

(e) failed to advise that expenditure above $55,000 per year would directly impact her ability to support her living needs.

[18] The changes made in the various iterations of the Statement of Claim did not advance any substantially new allegations of fact. The amendments referred to did provide more focussed descriptions of the duties alleged to have been breached, but nothing which would allow it to fairly be said that the full dimensions of the plaintiff's entitlement could not possibly have been foreseen before the time for acceptance expired.

[19] One of the ordinary risks of litigation is that pleadings are refined and particularised – this is not uncommon in a case concerning professional advice. It would be most unusual, in any case of moderate complexity for the pleadings to remain unaltered during the pre-trial processes. This is a predicament which faces all offerees.

[20] The only major change was the addition of the *Corporations Act* claim. It was based on the same set of allegations as the common law claims of breach of contract and negligence. While that statutory claim could not be subject to a reduction for contributory negligence, that aspect is not one upon which I place weight given that it was an alternative claim and one which, in the end, was not decisive.

[21] The plaintiff's claim had been well laid out by the time of the offer. Amendments made after the offer did not substantially change the claim. There were additions made, but they fell within the boundaries of the ordinary risks of litigation. If the usual course of litigation – in which refinements are made to pleadings and better expressions of a case are engaged – is not part of the consideration of an application for a different order, then the principal purpose of the provision in r 360 can be defeated.

[22] The defendant has not demonstrated that another order for costs is appropriate in the circumstances.

Conclusion

[23] The defendant is to pay the plaintiff's costs of the action assessed on the indemnity basis.