SUPREME COURT OF QUEENSLAND

CITATION:	*Pix v Suncoast Marine Pty Ltd & Anor* [2019] QSC 195
PARTIES:	**TREVOR KEITH PIX** **(plaintiff)** **v** **SUNCOAST MARINE PTY LTD** **ABN 41 091 644 101** **(first defendant)** **MICHAEL JOHN RIDER** **KATE RIDER** **(second defendants)**
FILE NO/S:	SC No 12976 of 2009
DIVISION:	Civil
PROCEEDING:	Trial
DELIVERED EX TEMPORE ON:	28 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	5 – 7 March 2018; 12 – 13 June 2018
JUDGE:	Holmes CJ
ORDER:	**The second defendants are to pay the plaintiff's costs of the action (subject to the existing order in relation to the costs of the March 2018 adjournment) on the standard basis up until 15 August 2017, and thereafter on the indemnity basis.**
CATCHWORDS:	PROCEDURE – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – PARTIAL SUCCESS – INDEMNITY COSTS – where the plaintiff proceeded against the first and second defendants in respect of the sale of a defective catamaran – where judgment was given against the second defendants for breach of a term implied by s 17 of the *Sale of Goods Act 1896* (Qld) in the sale contract – where the plaintiff seeks a *Sanderson* order against the second defendants in respect of the successful first defendant's costs – where the plaintiff seeks indemnity costs on the basis of offers to settle rejected by the second defendants – where the second defendants contend that the plaintiff should pay their costs until the date on which the statement of claim was amended to include the *Sale of Goods Act* claim – where the second defendants contend that the plaintiff's costs should be limited to 50% to reflect his failure on some aspects of his

claim -– where the second defendants contend that the plaintiff's offers did not comply with r 360 of the *Uniform Civil Procedure Rules* and in any event another order is appropriate – whether it was reasonable and proper for the plaintiff to proceed against the first defendant, warranting the making of a *Sanderson* order – whether the plaintiff's lack of success in relation to some issues and late addition of the *Sale of Goods Act* claim warrant an order different from the general rule that costs follow the event – whether the judgment was no less favourable than the offers – whether an order other than indemnity costs is appropriate

Sale of Goods Act 1896 (Qld), s 17
Uniform Civil Procedure Rules 1999 (Qld), r 360, r 362, r 363

Aircraft Technicians of Australia Pty Ltd v St Clair; *St Clair v Timtalla Pty Ltd* [2011] QCA 188, applied
Charter Pacific Corporation Limited v Belrida Enterprises Pty Ltd [2002] QSC 319; [2003] 2 Qd R 619, applied
Pix v Suncoast Marine Pty Ltd [2018] QSC 235, cited
Sanderson v Blyth Theatre Co [1903] 2 KB 533, considered

COUNSEL: S R Grant for the plaintiff
A W Duffy QC for the first and second defendants

SOLICITORS: Hall & Wilcox for the plaintiff
Thynne & Macartney for the first and second defendants

[1] The plaintiff commenced this action against the first and second defendants in 2009, alleging negligence and breach of contract in relation to defects in a vessel, and by amendment in 2016 added a claim for a breach of a term as to merchantable quality implied pursuant to the *Sale of Goods Act* 1896. I upheld the last claim as against the second defendants, giving judgment for the plaintiff in the amount of $988,458.00, and dismissed his claim against the first defendant, finding that it was not the vendor of the vessel and owed no duty of care.

[2] The parties have made submissions on costs. The plaintiff submits that the second defendants should pay his costs on an indemnity basis because of offers made in amounts less than the judgment sum and that a *Sanderson*[1] order should be made, requiring the second defendants to pay the first defendant's costs on the standard basis. The first defendant submits that there is no basis for the making of a *Sanderson* order and that the plaintiff should pay its costs. The second defendants say that they should have their costs up to 5 April 2016, when the plaintiff served an amended statement of claim which included the *Sale of Goods Act* claim; that the plaintiff's costs should be limited to that claim, which concerned defective paintwork, as opposed to unsuccessful claims relating to water ingress and failure to comply with commercial survey standards, so that only 50% of his costs should be allowed; and that the plaintiff should

[1] *Sanderson v Blyth Theatre Co* [1903] 2 KB 533.

pay their costs thrown away by an adjournment of the trial on 7 March 2018. Finally, they say, the plaintiff's submission seeking indemnity costs because of offers made should be rejected, because those offers did not comply with r 360 of the *Uniform Civil Procedure Rules* 1999.

[3] The plaintiff contends that the conditions identified in *Aircraft Technicians of Australia Pty Ltd v St Clair*[2] for a *Sanderson* order are met. It submits that it was reasonable and proper for him to pursue the first defendant because the second defendants had warranted in the contract that they had built the vessel, when in fact the first defendant was the builder. Their conduct in that regard gave rise to a question about whether they were acting as the first defendant's agents on the sale of the vessel. They were the first defendant's sole directors and shareholders, and the claims against them were closely connected.

[4] Nowhere was it represented that the first defendant was the seller of the vessel. As I have found,[3] the second defendants' warranty that they were the builder was at odds with other parts of the contract, the vessel specifications and the builder's warranty itself. In any event, the actions of the second defendants in warranting that they were the vessel's builder could not rationally have led to a conclusion that they were merely agents for the first defendant on the sale. There was no basis for claiming in contract against the first defendant and the claim in negligence against it was, as I found, untenable. No *Sanderson* order is warranted and the plaintiff should pay the first defendant's costs on the standard basis.

[5] I had already made the order, on 7 March 2018, that the second defendants' costs thrown away by the adjournment on that date should be paid by the plaintiff, so there is in fact no issue about that matter. I do not consider that the plaintiff's lack of success in relation to the water ingress and the survey compliance claims warrants making an order different from the usual, that costs should follow the event. Nor do I consider that the late addition of the *Sale of Goods Act* claim in 2016 was of such consequence that the plaintiff should be required to pay the second defendants' costs or be denied his own costs up to that time. The claim was always one of supply of defective goods in breach of contract, and the allegation in relation to defects in the vessel's paintwork was made from the first iteration of the statement of claim.

[6] That leaves the question of the effect of the plaintiff's offers. Rule 360(1) 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.

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[2] [2011] QCA 188 at [147].
[3] *Pix v Suncoast Marine Pty Ltd* [2018] QSC 235 at [31].

Rule 362 requires the court in considering whether the offer is as favourable as the judgment to disregard interest awarded in relation to the period after the offer was served.

[7] The first offer to settle, in an amount of $750,000 plus costs, was made to the second defendants on 6 April 2011. They submit that the offer is not as favourable as the judgment, because it should be judged against the amount which would then have been awarded, calculated by the defendants at $708,165.20. In addition, it is said, the merchantable quality claim had not been made in respect of the second defendants at that time. The second defendants' calculation appears to be correct. By 6 April 2011, the only accrued interest amount was $164,165.20, in respect of the diminution in the vessel's value (assessed at $418,000) since the date of the vessel's delivery, 27 April 2007. There was a further award of $126,000 in relation to loss of use of the vessel, but interest in respect of that head of damage was awarded from February 2013. The two amounts for damages and the interest to the date of the offer total $708,165.20, less than the offer (and less than the amount of a *Calderbank* offer of the same date). Rule 360 does not apply.

[8] In any event, as at April 2011, the claim against the second defendants was in respect of paintwork defects and was made, so far as the contract was concerned, on the basis of an alleged builder's warranty and, alternatively, in negligence. In fact, the second defendants' warranty was simply that they were the builders of the vessel. It said nothing as to the vessel's condition; and insofar as they agreed to, and did, provide a builder's warranty from the first defendant, it related only to structural defects, which the paintwork defects were not. There was, as I found, no prospect of success in negligence. At that time, the only viable claim had not then been made and the second defendants could not reasonably have been expected to accept the offer on the state of the pleadings on that date.

[9] A further offer was made to both defendants on 15 August 2017, on the basis that the plaintiff would accept $400,000 in settlement, with the defendants to pay the plaintiff's costs. Rule 363(1) appears to contemplate that separate offers should be made to defendants except where joint liability is alleged. The second defendants submitted that this was not such a case, but it seems to me that the claim that the second defendants acted as the first defendant's agent, it being their undisclosed principal, amounted to an assertion of joint liability. It does not matter that the allegation of joint liability was not made in terms or that not all of the causes of action involved joint liability.[4] I am satisfied that the plaintiff was, at that time, willing and able to carry out what was proposed in the offer.

[10] The second defendants submit that if the offer was within the *Rules*, another order than indemnity costs was appropriate because at that time the plaintiff delivered a spreadsheet in which, if the cost of work for which claims were not allowed was deducted from the total claim for repairs, the balance in relation to paintwork defects (the measure of diminution in value) was only $150,000. It would not have been unreasonable on that basis, it was said, to have rejected the offer. But doubtful as some of the arithmetic may have been, the spreadsheet actually claimed $569,304.63 for paintwork defects, significantly more than the amount of the offer. I do not think it

[4] *Charter Pacific Corporation Limited v Belrida Enterprises Pty Ltd* [2003] 2 Qd R 619 at [23].

provided any justification for the second defendants' failing to accept the offer so as to make another order than requiring them to pay indemnity costs appropriate.

[11] For those reasons I conclude that the second defendants should pay the plaintiff's costs of the action (subject to the existing order in relation to the costs of the March 2018 adjournment), on the standard basis up until 15 August 2017, and thereafter on the indemnity basis.