SUPREME COURT OF QUEENSLAND

CITATION:	*Tisdall v Omeros & Anor* [2019] QSC 236
PARTIES:	**DAVID CHRISTOPHER TISDALL** (plaintiff) **v** **MICHAEL NICTARIOS OMEROS** (first defendant) **BRENT EVANS PADDON** (second defendant)
FILE NO:	BS 2199 of 2018
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGE:	Bradley J
ORDER:	**Order made on 20 September 2019:** **The plaintiff pay the defendants' costs of the proceeding on the standard basis up to and including 5 March 2019 and on the indemnity basis from and including 6 March 2019.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – PARTICULAR CASES – ABUSE OF PROCESS – where, after trial, the plaintiff's claim against the defendants was dismissed and judgment was entered for the defendants – where the plaintiff was found to have given false and dishonest evidence at trial – where the defendants seek an award of indemnity costs for the whole of the proceeding on the basis that the plaintiff's dishonesty constituted an abuse of process – whether indemnity costs may be awarded as a sanction for giving false evidence PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – PARTICULAR CASES – HOPELESS CASES – where the defendants contend that an award of indemnity costs is justified on the basis that the plaintiff's claims were hopeless and bound to fail – where the plaintiff's claims survived until

trial and were not subject to any applications for strike out or summary judgment – whether the plaintiff's claims were hopeless and bound to fail in the relevant sense

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – PARTICULAR CASES – UNREASONABLE CONDUCT OR DELINQUENCY RELATING TO PROCEEDINGS – where the defendants contend that the plaintiff's claim was speculative and brought with an improper motive – where the defendants tendered at trial a written admission by the plaintiff that he had commenced the proceeding in a speculative frame of mind – whether the commencement and continuation of the claim, of itself, justifies an award of indemnity costs

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 the plaintiff rejected a *Calderbank* offer from the defendants – where the offer was made after the pleadings had been finalised, disclosure had been completed and a trial date had been set – whether the plaintiff's rejection of the offer was unreasonable – whether costs ought to be awarded on the indemnity basis from the date of the offer

Civil Proceedings Act 2011 (Qld), s 15
Uniform Civil Procedure Rules 1999 (Qld), r 681, r 702, r 703

Beardmore v Franklins Management Services Pty Ltd [2003] 1 Qd R 1; [2002] QCA 60, applied
Calderbank v Calderbank [1975] 3 WLR 586; [1976] Fam 93, applied
Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225; [1993] FCA 536, cited
Conde v Gilfoyle & Anor [2010] QCA 173, cited
Hammercall Pty Ltd v Robertson & Anor; Hammercall Pty Ltd v Robertson & Ors [2011] QCA 380, cited
Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) (2005) VR 435; [2005] VSCA 298, applied
Huntsman Chemical Company Australia Ltd v International Pools Australia Ltd (1995) 36 NSWLR 242, cited
Johns v Cosgrove [2002] 1 Qd R 57; [2002] QCA 157, cited
Petrotrade Inc v Texaco Ltd [2002] 1 WLR 947, cited
Preston v Preston [1981] 3 WLR 619, cited
Reeves v O'Riley [2013] QCA 285, cited
Rosniak v Government Insurance Office (1997) 41 NSWLR 608, cited

Smits v Tabone; Blue Coast Yeppoon Pty Ltd v Tabone [2007] QCA 337, cited
Tector v FAI General Insurance Company Ltd [2001] 2 Qd R 463; [2000] QCA 426, cited
Tisdall v Omeros & Anor [2019] QSC 220, related
Vision Gateway & Anor v Moretonsoft Pty Ltd & Ors [2009] QCA 312, applied

COUNSEL: M D Martin QC for the plaintiff
G A Thompson QC SG, with M S Trim, for the defendants

SOLICITORS: Mills Oakley for the plaintiff
McCullough Robertson for the defendants

[1] On 6 September 2019, judgment was pronounced for the defendants and reasons were published.[1] The court invited submissions on any other orders.

[2] On the question of an appropriate order as to costs, Mr Thompson QC SG, who appeared with Mr Trim of counsel for the defendants, tendered a letter dated 6 March 2019 from their instructing solicitors to the plaintiff's solicitors offering to compromise the whole of the proceeding. Mr Martin QC for the plaintiff sought directions for an exchange of written submissions on costs. These were made.

[3] The defendants' written submissions were received on 11 September 2019 and the plaintiff's on 13 September 2019. After consideration of the written submissions, orders relating to costs were made on 20 September 2019. Owing to an unplanned outage of the information technology systems that day, the court was unable to publish these reasons for the decision at the time the orders were made.

The contending submissions

[4] The court has statutory power to award costs[2] and that such orders are in the discretion of the court, save that they follow the event, unless the court orders otherwise.[3] The usual order in the present proceeding would require the plaintiff to pay the defendants' costs on the standard basis. This would oblige the plaintiff to pay to the defendants an amount assessed by a qualified person as "all costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed."[4] It is commonly understood that such "standard" costs amount to a sum between one-half and two-thirds of the actual legal costs incurred by a party in a proceeding.

[5] The plaintiff submits that the usual order should be made, so that the plaintiff would be ordered to pay the defendants' costs of the proceeding on the standard basis.

[6] The defendants seek an order that the plaintiff pay their costs of the proceeding on the indemnity basis. In the alternative, they ask for an order that the plaintiff pay their costs on the standard basis until 6 March 2019 and on the indemnity basis from that

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1 *Tisdall v Omeros & Anor* [2019] QSC 220.
2 *Civil Proceedings Act* 2011 (Qld), s 15.
3 *Uniform Civil Procedure Rules* 1999 (Qld), r 681.
4 r 702(2).

date, being the date of their offer. Where costs are assessed on the indemnity basis, all costs reasonably incurred and of a reasonable amount are allowed, having regard to the court's prescribed scale of fees, the relevant costs agreement and the charges ordinarily payable by a client to a solicitor for the work.[5]

[7] As they seek a different outcome, the defendants must persuade the court there is a basis for an order for indemnity costs. They identify three matters in support of their contention that the plaintiff ought to be ordered to pay their costs of the proceeding on an indemnity basis:

> "(i) the Plaintiff has been found to have given deliberately false evidence and to have lied in evidence on numerous occasions, constituting an abuse of the Court's processes;
>
> (ii) the proceeding was hopeless and bound to fail for the reasons pleaded in the Defence, was contradicted by disclosed documents which were not controversial and most importantly it relied on the untruthful evidence of the Plaintiff being accepted (particularly that he was told there would be no IPO);
>
> (iii) the Court should find that the proceeding was speculatively commenced and continued for an improper purpose or with an improper motive such as to warrant costs on an indemnity basis."

[8] It is convenient to consider each of these matters in turn.

A sanction for giving false evidence

[9] The court has made rules providing for the awarding of indemnity costs in circumstances where offers of compromise are made and not accepted,[6] where payments are to be made out of a fund, where the party to be paid costs is one who sues or is sued as a trustee, or where the costs were incurred in an application for noncompliance with an order.[7] These rules do not signal that an award of indemnity costs implies misconduct on the part of the party ordered to pay them.

[10] Where a party has acted in the litigation in a way that is "plainly unreasonable", so as to have caused another party to incur increased costs, the court may redress the position by allowing the affected party to recover its costs on the more generous basis.[8] This question of unreasonableness encompasses the prosecution of the party's claim or the conduct of its defence.[9]

[11] A departure from the ordinary practice has been justified by "some special or unusual feature in the case."[10] The most obvious is where a proceeding is brought that has no

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5 r 703(3).
6 r 360(1).
7 r 703(2)(a), (b), (c).
8 *Tector v FAI General Insurance Company Ltd* [2001] 2 Qd R 463 at 464 [5] (McMurdo P, Pincus JA and White J).
9 *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608 at 616C-D (Mason P).
10 *Preston v Preston* [1981] 3 WLR 619 at 637 (Brandon LJ).

proper basis in law or fact and is pursued "based on fantasy, not reality."[11] Other examples were collected by Sheppard J in *Colgate-Palmolive v Cussons*,[12] including: the making of allegations of fraud knowing them to be false or irrelevant allegations of fraud; misconduct that causes loss of time to the court and the parties; persisting with a case that, on proper consideration, is hopeless, or for an ulterior motive or in wilful disregard of known facts or clearly established law; the making of allegations which should never have been made; the undue prolongation of a case by groundless contentions; the imprudent refusal of an offer to compromise; and a party responding to another acting in contempt of court should not be disadvantaged by the unreasonable conduct of the contemnor. There is no exhaustive list.

[12] Leaving aside the special protection afforded trustees and the like, in general, Australian courts have decided whether indemnity costs ought to be awarded after an examination of the reasonableness of the conduct of the party to be charged.

[13] There may be attraction in the defendants' submission that an order for costs on the indemnity basis would deter or sanction a party who gave deliberately false evidence in an attempt to mislead the court. However, that does not appear to be the state of the law in this country.[13] Instances exist where a judgment was obtained by a party's fraud, and costs were awarded on the standard basis.[14] Being found to have given false testimony or tendered a false document does not appear to be within the "narrow category of cases warranting an award of indemnity costs."[15] Whatever sanctions might be available to deter or punish such wrong-doing, the instruments in the armoury of costs orders are not amongst them. This is not to exclude an indemnity costs order being appropriate when, due to a party's dishonesty or other misconduct, the proceeding is conducted unreasonably.

[14] The awarding of indemnity costs does not produce any penal consequences. It does not allow a party to recover more costs than were incurred. As Lord Woolf MR observed,

> "orders for costs, even when made on an indemnity basis, never actually compensate a claimant for having to come to court to bring proceedings. The very process of being involved in court proceedings inevitably has an impact on a claimant, whether he is a private individual or a multinational corporation. A claimant would be better off had he not become involved in court proceedings. … [P]roceedings necessarily involve inconvenience and frequently involve anxiety and distress. These are not taken into account when assessing costs on the normal basis."[16]

[15] The practical effect of the order is that the party's costs are not assessed at a lesser figure. The focus of attention ought to be the party to have the benefit of any costs order and whether the order is appropriate as a "means of achieving a fairer result".

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11 *Hammercall Pty Ltd v Robertson & Anor; Hammercall Pty Ltd v Robertson & Ors* [2011] QCA 380 at [69] (Chesterman and White JJA and Boddice J).

12 *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225 at 231-232.

13 The position may be different in England and Wales under the *Civil Procedure Rules* 1998; see: *Esure Services Ltd v Quarcoo* [2009] EWCA Civ 595 at [23] (Waller LJ; Longmore and Richards LJJ agreeing).

14 *Johns v Cosgrove* [2002] 1 Qd R 57.

15 *Vision Gateway & Anor v Moretonsoft Pty Ltd & Ors* [2009] QCA 312 at [9] (McMurdo P).

16 *Petrotrade Inc v Texaco Ltd* [2002] 1 WLR 947 at 949 [63].

[16] The purpose of any costs order is to protect a successful party from the undue depletion of its resources from the pursuit of its lawful rights or the defence of its lawful conduct. It is not to punish an unsuccessful (or insufficiently successful) party. An indemnity costs order, therefore, is typically deployed where a party has behaved unreasonably in a way that has increased the costs the other party has incurred. In such cases, other things being equal, the court may decide an award of costs on the standard basis would be insufficient to protect the successful party.

A hopeless case that was bound to fail

[17] The defendants contend that the plaintiff's claims were hopeless and bound to fail. Indemnity costs have been ordered to be paid by a party persisting with a case that, on proper consideration, is hopeless.[17]

[18] One would not readily characterise the plaintiff's claims – that, in trade or commerce, a defendant failed to disclose or withheld certain information from a plaintiff, thereby causing loss – as bound to fail. The plaintiff's claims survived until the trial, without strike out or summary judgment. Although lack of clarity in the pleadings may account for this in part, the fuller explanation must include a decision by the defendants that they could not persuade the court, short of a trial, that the claims were "manifestly hopeless"[18] or "wholly without any arguable merit."[19] The claims did not depend upon disregarding clearly established law. The facts upon which they turned were in dispute between the parties. I am not persuaded that the plaintiff's claims were hopeless in the relevant sense. The parties may have thought the claims likely to fail, but that alone falls short of the position in which indemnity costs have been ordered.

A speculative claim with an improper motive

[19] At the trial, the defendants tendered a written admission by the plaintiff that he had embarked upon the litigation in a speculative frame of mind. It was a frank admission. He estimated the sum he would be awarded, if he succeeded, at $41 million and the costs he would pay, if he did not, at $500,000.

[20] One might hope that most parties would take such matters into consideration before commencing a proceeding and review them over its course. The fact of the assessment, including the recognition of the speculative nature of civil litigation, does not impute to the plaintiff an improper purpose or an improper motive.

[21] The plaintiff's assessment of his prospects of success as "50:50" proved to be wildly optimistic. However, he claimed a considerable sum and he might reasonably have considered it was worth pursuing even with low prospects of success.

[22] I am not persuaded the commencement and continuation of the claim, of itself, justifies an award of indemnity costs.

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17 *Huntsman Chemical Company Australia Ltd v International Pools Australia Ltd* (1995) 36 NSWLR 242 at 273 (Rolfe AJA).

18 *Conde v Gilfoyle & Anor* [2010] QCA 173 at [5] (McMurdo P, Fraser JA and P Lyons J).

19 *Smits v Tabone; Blue Coast Yeppoon Pty Ltd v Tabone* [2007] QCA 337 at [48] (Cullinane J; Muir JA and P Lyons J agreeing).

The *Calderbank* offer

[23] In the alternative to their principal contentions, the defendants point to the plaintiff's rejection of their 6 March 2019 offer as a basis for an order for indemnity costs from that day.

[24] The failure of a party to consider seriously and accept a reasonable offer to settle is a particular aspect of unreasonable conduct that might lead to an increased cost burden on another party. The purpose of a costs order in the context of an offer of compromise is the same, whether the offer is made under part 5 of the UCPR or in accordance with the well-known principles in *Calderbank v Calderbank*.[20] It is to encourage resolution of disputes without the necessity of a trial. Consonant with the purpose of the rules – to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum expense – the court may exercise its discretion to make or refuse an order for indemnity costs,

> "to encourage and motivate parties to litigation to make bona fide and reasonable efforts to settle their litigation and to avoid the expense and expenditure of time involved in pursuing a claim to judgment in court."[21]

[25] The same object was described more bluntly, in the context of the *Civil Procedure Rules* (Eng & W) as being "to encourage parties to avoid proceedings unless it is unreasonable for them to do otherwise."[22]

[26] Although it arose out of a business transaction, all of the parties to the proceeding were individuals.

[27] By the time the defendants' offer was made, the pleadings were finalised, disclosure was complete and the proceeding had been set down for trial. The plaintiff bore the evidential burden. The disclosure of documents (by all parties) had presented obvious challenges for the plaintiff's claims. The plaintiff ought to have been in a good position to assess (or reassess) his prospects.

[28] The offer was open for acceptance for 14 days, which was a reasonable period for the plaintiff to consider it and take any appropriate advice.

[29] The defendants offered to pay the plaintiff $250,000. This proposed a genuine compromise of the dispute. Acting reasonably, at that time the defendants would have assessed their prospects of success to be good.

[30] The offer was expressed in clear terms: a single sum to be paid, a deed with mutual releases and confidentiality. It cited the decision in *Calderbank* and confirmed that, if the plaintiff did not accept the offer and the defendants obtained an order no less favourable than the offer, the defendants would rely on the letter of offer on the question of costs.

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20 [1976] Fam 93.

21 *Beardmore v Franklins Management Services Pty Ltd* [2003] 1 Qd R 1 at [106] (Ambrose J).

22 *Petrotrade Inc v Texaco Ltd* [2002] 1 WLR 947 at 949 [63] (Lord Woolf MR).

[31] I am satisfied it was a reasonable offer made in good faith.[23]

[32] By rejecting the offer, the plaintiff continued to involve the defendants in the proceeding, including a trial that lasted six days. The result was much less favourable to the plaintiff than that he would have achieved if the offer had been accepted.

[33] The plaintiff's explanation for rejecting the offer was to describe it as "a very small amount" and to regard acceptance as "essentially a capitulation". The plaintiff was wrong to characterise the offer in this way. As recounted in his written submissions, there was an element of ego in the plaintiff's rejection of the offer, quite different from his cool calculation of costs and prospects at the outset of the proceeding.

[34] In the circumstances, the plaintiff's rejection was unreasonable and imprudent. It would be just to make an order for costs that takes account of the circumstance that the offer was made and was not accepted. I am satisfied that an award of costs on the standard basis would be insufficient to protect the defendants from the consequences of the plaintiff's unreasonable conduct.

Disposition

[35] The plaintiff should be ordered to pay the defendants' costs on the standard basis up to and including 5 March 2019 and on the indemnity basis from and including 6 March 2019.

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[23] *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) VR 435 at [25], cited with evident approval in *Reeves v O'Riley* [2013] QCA 285 at [4] (Holmes and Muir JJA and Mullins J).