

SUPREME COURT OF QUEENSLAND

CITATION: *Hanson & Anor v Goomboorian Transport Pty Ltd & Ors*
[2019] QCA 207

PARTIES: **In Appeal No 7390 of 2018; Appeal No 9804 of 2018 and
Appeal No 9806 of 2018:**

DOROTHY MAUREEN HANSON

(first appellant)

NORMAN RICHARD HANSON

(second appellant)

v

GOOMBOORIAN TRANSPORT PTY LTD

ACN 011 054 658

(first respondent)

J & M LOGHANDLING PTY LTD

ACN 011 054 667

(second respondent)

BELLING INVESTMENTS PTY LTD

ACN 123 710 734

(third respondent)

GOOMBOORIAN LOGGING PTY LTD

ACN 076 970 995

(fourth respondent)

LITTLE YABBA DROUGHTMASTER STUD PTY LTD

ACN 086 875 845

(fifth respondent)

EMMERDALE FARMING PTY LTD

ACN 151 515 909

(sixth respondent)

JILRAY PTY LTD

ACN 058 181 463

(seventh respondent)

J & M FARMING PTY LTD

ACN 086 991 291

(eighth respondent)

**J & M FARMING PTY LTD and LITTLE YABBA
DROUGHTMASTER STUD PTY LTD**

ABN 89 152 178 639

(ninth respondent)

JOHN GERHARD BELLING

(tenth respondent)

MARLENE ANNE BELLING

(eleventh respondent)

FILE NO/S: Appeal No 7390 of 2018
Appeal No 9804 of 2018
Appeal No 9806 of 2018
SC No 4392 of 2015

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Orders

ORIGINATING COURT: Supreme Court at Brisbane – [2018] QSC 135; [2018] QSC 182; [2018] QSC 189 (Bond J)

DELIVERED ON: 4 October 2019

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Gotterson and McMurdo JJA and Douglas J

ORDERS: **In each appeal:**

1. **The appellants are released from paragraph one of the Order made on 26 March 2019 and the undertaking referred to therein to the extent necessary to enable funds held on their behalf in the Big Law Lawyers’ trust account to be withdrawn for the sole purpose of paying the second, third, sixth and tenth respondents their proportionate shares of the proceeds from the Asteron Life Policy as follows:**
 - (a) **\$15,022.11 to the tenth respondent;**
 - (b) **\$30,044.22 to the second and tenth respondents; and**
 - (c) **\$15,022.11 to the third and sixth respondents,**
together with, in each instance, interest thereon pursuant to the *Civil Proceedings Act 2011* from 10 February 2015 to the date of this order.
2. **As to the costs, including reserved costs, of Proceeding No 4392 of 2015,**
 - (a) **The second and third defendants are to pay the plaintiffs’ costs, calculated on the standard basis, up to and including 28 March 2017;**
 - (b) **The plaintiffs are to pay the second and third defendants’ costs, calculated on the indemnity basis, from 29 March 2017.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – where the Court ordered further submissions from the parties with respect to further orders and the costs of the proceeding at first instance – where the respondents enjoyed a measure of success in the proceedings – where the appellants served a written offer to settle the respondents’ claims in full before the first date of the trial which was not accepted – where the offer made by the appellants exceeded the total monetary value of the orders made and the appellants’ recoverable costs to that point –

whether the decision to reject the *Calderbank* offer made by the appellants was unreasonable or imprudent

Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) (2005) 13 VR 435; [2005] VSCA 298, cited *McBride v ASK Funding Ltd* [2013] QCA 130, applied

COUNSEL: The appellants' submissions were heard on the papers
The respondents' submissions were heard on the papers

SOLICITORS: Baldwins Lawyers for the appellants
Griffith Hack for the respondents

- [1] **GOTTERSON JA:** By orders made on 12 March 2019, provision was made for written submissions to be made on two separate issues. Order 4(b) of those orders permitted submissions by the second, third, sixth and tenth respondents concerning orders for the securing of payment to them of their respective shares of the Asteron Life Policy 81318923 as determined by this Court. Order 4(c) directed written submissions from all parties with respect to costs of the proceeding at first instance.

Order 4(b) issue – submissions and further order

- [2] The relevant respondents made written submissions with respect to this issue. The appellants have not availed themselves of the opportunity to respond. The order proposed by the respondents is in my view appropriate subject to an adjustment which I have made, namely, that the quantum of each of the respective shares should be calculated on the amount of the proceeds paid by the insurer on 9 February 2015, with interest awarded on each share from 10 February 2015. The making of an order of this kind is unchallenged by the appellants. It is an order that the Court should therefore make.

Order 4(c) issue – submission and further order

- [3] This issue concerns the costs of the proceeding at first instance up to the present. Both the appellants and the respondents made written submissions with respect to it.
- [4] This is a case in which the plaintiffs at first instance have enjoyed a measure of success. A claim for declaratory relief in their favour of an equitable lien in the amount of \$12,622.22 over the home of the appellants, who were the second and third defendants at first instance, was made. That amount equalled the monetary value of benefits those defendants received for which they admitted they were liable to account to the plaintiffs. An appeal against the declaration was not pursued.
- [5] Further, some of the respondents have the benefit of orders made by this Court which together entitled them to 4/95^{ths} of the proceeds of the life policy. That portion of the proceeds had a monetary value of \$60,088.44 (\$15,022.11 x 4) at the date of payment of the policy. This success was, however, very modest in comparison with the claim made by the plaintiffs to the entirety of the proceeds of the policy, some \$1,427,100.41.
- [6] The trial commenced on 3 April 2017 and was heard over five days. No admissions were made as to the provenance of the funds which the deceased had used to pay monthly premiums on the policy. Ultimately, the plaintiffs were able to prove that

four of the 95 premiums that were paid were sourced in funds that the deceased had stolen from some of the plaintiffs.

- [7] A relevant consideration is that on 28 March 2017, and before the first day of the trial, the second and third defendants served a written offer to settle the plaintiffs' claims in full for \$500,000 with each party to pay its own costs. The offer was open for acceptance until 4 pm on 31 March 2017. It was not accepted.
- [8] This offer stated that it was "made pursuant to the principles described in *Calderbank v Calderbank*". It did not contain a statement that it was made under Part 5 of Chapter 9 *UCPR*. It was therefore not an offer to which Part 5 applies: r 353(3).
- [9] Consistently with the decision of this Court in *McBride v ASK Funding Ltd*,¹ the costs consequences of the failure to accept the offer fall to be determined according to the principles in *Calderbank*, and not by the application of r 361 *UCPR*. The central question posed by those principles is whether the plaintiffs acted "unreasonably or imprudently" in not accepting the offer.
- [10] I now turn to consider that question. I do so with the benefit of the exposition by the Court of Appeal of Victoria in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)*² of the matters to which a court ought ordinarily have regard in considering whether a rejection of a settlement offer was unreasonable.
- [11] Here, the offer was made shortly before the commencement of the trial and at a time when the pre-trial steps had been completed. At that point, the plaintiffs were in a position to well appreciate the issues in dispute and to assess realistically their prospects of success. The time allowed for acceptance was not unreasonable.
- [12] At that time, the plaintiffs would have known that on the admissions, they had a viable claim to \$12,622.22. They would have known also how many of the premiums on the policy they could prove had been made from stolen monies. As well, they would, or ought to, have known that authority at the highest judicial level supported a claim which was limited to the fractional share of the proceeds of the policy attributable to those four premiums, \$60,088.44.
- [13] Allowing for interest on those components to the date of the offer, the combined value of the orders to the plaintiffs was less than \$80,000. Ms KA Stonier, a principal of the respondents' solicitors, has made an affidavit in which she estimates the amount of the plaintiffs' recoverable costs up to 28 March 2017. It is slightly less than \$400,000. Hence, the offer made by the second and third defendants exceeded the total of the monetary value of the orders made and the only assessment put before this Court of the plaintiffs' recoverable costs to that point. That that was very likely to be so was reasonably ascertainable at the time when the offer was rejected. I would add that it is unnecessary for present purposes to consider whether the estimate is a reasonable one.
- [14] I am satisfied that the second and third defendants were at all times willing and able to make the payment that they had offered. They could have readily done that from the proceeds of the policy.

¹ [2013] QCA 130 per Jackson J at [62]-[65] (Muir and Gotterson JJA agreeing).

² [2005] VSCA 298; (2005) 13 VR 435 at [20], applied in *J & D Rigging Pty Ltd v Agripower Australia Limited & Ors* [2014] QCA 23 at [6].

- [15] The terms of the offer were clearly expressed. Although no reference was expressly made to indemnity costs, it would have been obvious to the plaintiffs' legal representatives to whom the offer was addressed, that it signalled an intention to pursue indemnity costs conformably with the principles in *Calderbank*.
- [16] For these reasons, I have come to the conclusion that the rejection of the offer was unreasonable. It follows, in my view, that the second and third defendants should pay the plaintiffs' costs assessed on the standard basis up to and including 28 March 2017, but that the plaintiffs should pay the costs of those defendants assessed on the indemnity basis from 29 March 2017.

Orders

- [17] Consistently with these reasons, I would propose the following orders in each appeal:
1. The appellants are released from paragraph one of the Order made on 26 March 2019 and the undertaking referred to therein to the extent necessary to enable funds held on their behalf in the Big Law Lawyers' trust account to be withdrawn for the sole purpose of paying the second, third, sixth and tenth respondents their proportionate shares of the proceeds from the Asteron Life Policy as follows:
 - (a) \$15,022.11 to the tenth respondent;
 - (b) \$30,044.22 to the second and tenth respondents; and
 - (c) \$15,022.11 to the third and sixth respondents,together with, in each instance, interest thereon pursuant to the *Civil Proceedings Act* 2011 from 10 February 2015 to the date of this order.
 2. As to the costs, including reserved costs, of Proceeding No 4392 of 2015,
 - (a) The second and third defendants are to pay the plaintiffs' costs, calculated on the standard basis, up to and including 28 March 2017;
 - (b) The plaintiffs are to pay the second and third defendants' costs, calculated on the indemnity basis, from 29 March 2017.

[18] **McMURDO JA:** I agree with Gotterson JA.

[19] **DOUGLAS J:** I agree with Gotterson JA.