

# SUPREME COURT OF QUEENSLAND

CITATION: *Rider & Anor v Pix* [2019] QCA 257

PARTIES: **MICHAEL JOHN RIDER**  
**KATE RIDER**  
(appellants)  
v  
**TREVOR KEITH PIX**  
(respondent)

FILE NO/S: Appeal No 3665 of 2019  
SC No 12976 of 2009

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Order

ORIGINATING COURT: Supreme Court at Brisbane – [2018] QSC 235 and [2019] QSC 45 (Holmes CJ)

DELIVERED ON: 19 November 2019

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Sofronoff P and Morrison JA and Flanagan J

ORDER: **The appellants pay the respondent’s costs of the appeal.**

CATCHWORDS: 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 OFFERS – where, prior to the first return date of the appeal, the respondent made two offers to settle the appeal – where the costs of the trial were pending at the date of the offers – where the offers to settle dealt with the costs of the trial – where the respondent offered to accept a smaller sum than he was awarded at trial – where the appellants rejected the offers – where the Court dismissed the appeal – whether the respondent should be awarded his costs of the appeal on the indemnity basis

*Uniform Civil Procedure Rules* 1999 (Qld), r 681, r 702, r 703, r 771

*Calderbank v Calderbank* [1975] 3 All ER 333, cited  
*Colgate-Palmolive Company & Anor v Cussons Pty Ltd* (1993) 46 FCR 225; [1993] FCA 536, cited  
*Deepcliffe Pty Ltd & Anor v The Council of the City of Gold Coast & Anor* [\[2001\] QCA 396](#), cited

*Financial Integrity Pty Ltd v Farmer and Bravium Pty Ltd (No 4)* [2014] ACTSC 145, cited  
*Globaltech Pty Ltd v Pareek* [2006] WASC 30, cited  
*Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435; [2005] VSCA 298, applied  
*Pix v Suncoast Marine Pty Ltd & Anor* [2019] QSC 195, related  
*Reeves v O'Riley* [2013] QCA 285, cited  
*Rider & Anor v Pix* [2019] QCA 182, related  
*Sanderson v Blyth Theatre Company Ltd* [1903] 2 KB 533, cited  
*Secretary to the Department of Business and Innovation v Murdesk Investments Pty Ltd (No 2)* [2012] VSC 586, cited  
*Tector v FAI General Insurance Company Ltd* [2001] 2 Qd R 463; [2000] QCA 426, cited

COUNSEL: A S Marinac (*sol*) for the appellants  
 G A Thompson QC, with S R Grant, for the respondent

SOLICITORS: Pacific Maritime Lawyers for the appellants  
 Hall & Wilcox for the respondent

- [1] **SOFRONOFF P:** I agree with Flanagan J.
- [2] **MORRISON JA:** I have read the reasons of Flanagan J and agree with those reasons and the order his Honour proposes.
- [3] **FLANAGAN J:** On 10 September 2019, this Court dismissed an appeal against two decisions of the Chief Justice.<sup>1</sup> As it transpires, the respondent, Mr Pix, made offers to settle immediately before the first return date of the appeal. The appellants, Michael and Kate Rider, rejected those offers. The issue now is whether the Riders' rejection of Mr Pix's offers to settle justifies an order that the Riders pay Mr Pix's costs of the appeal on the indemnity basis.

### The offers

- [4] It is necessary to place the offers to settle in their proper context. This case concerned the sale of a catamaran by the Riders to Mr Pix. The catamaran was built by the Riders' company, Suncoast Marine Pty Ltd. The catamaran's paintwork was defective. At trial, there was an issue as to whether the Riders entered into the contract personally or on behalf of Suncoast Marine. On 12 October 2018, the Chief Justice dismissed the claim against Suncoast Marine but held the Riders liable for breach of the implied condition as to merchantable quality.<sup>2</sup> In a subsequent decision on 8 March 2019, her Honour awarded damages in the sum of \$988,458. The Riders filed a notice of appeal on 5 April 2019 against both decisions. By their notice of appeal, the Riders appealed on three grounds. They first argued that her Honour erred in finding that there was a condition of merchantable quality. The second and third grounds sought to reduce Mr Pix's award of damages to \$884,536.
- [5] On 23 April 2019, which was the day before the first return date of the appeal, Mr Pix made two offers to settle the appeal. The first was a Calderbank offer<sup>3</sup> to

<sup>1</sup> *Rider & Anor v Pix* [2019] QCA 182; *Pix v Suncoast Marine Pty Ltd & Anor* [2018] QSC 235; and *Pix v Suncoast Marine Pty Ltd & Anor* [2019] QSC 45.

<sup>2</sup> *Sale of Goods Act* 1896 s 17(c).

<sup>3</sup> *Calderbank v Calderbank* [1975] 3 All ER 333.

settle for \$884,536 plus the costs of the trial to be agreed or assessed on the basis to be determined by the Chief Justice. The second was an offer ostensibly made pursuant to Chapter 9 Part 5 of the *Uniform Civil Procedure Rules 1999 (UCPR)*. It should be observed immediately that the offer could not have been made under those provisions of the UCPR as they do not apply to appeals.<sup>4</sup> Putting that aside, the effect of the second offer was as follows:

1. Mr Pix would accept \$884,536 in full and final satisfaction of the damages claim;
2. The Riders would pay Mr Pix's costs and disbursements of and incidental to the proceedings below, to be agreed or assessed on the basis to be determined by the Chief Justice, including any costs of Suncoast Marine to be ultimately paid by Mr Pix as ordered by her Honour; and
3. The Riders would pay Mr Pix's costs and disbursements of and incidental to the appeal on a standard basis.

- [6] As is apparent from their terms, the offers were made before any order had been made about costs of the proceeding below. On 28 June 2019, the Chief Justice ordered the Riders to pay Mr Pix's costs on the standard basis up until 15 August 2017 and thereafter on the indemnity basis.<sup>5</sup> As for Suncoast Marine, her Honour declined to make a *Sanderson*<sup>6</sup> order against the Riders. Having been successful, Suncoast Marine was entitled to its costs (on the standard basis) from Mr Pix.
- [7] The Riders rejected Mr Pix's offers to settle. The appeal was heard on 22 August 2019. This Court dismissed the Riders' appeal.

### Relevant legal principles

- [8] Chapter 17A of the UCPR applies to the costs of appeals.<sup>7</sup> The general rule in r 681 is that costs follow the event, subject to the Court's discretion. Rule 702 provides that costs are to be assessed on the standard basis unless the Court or the UCPR provides otherwise. This is subject to the Court's discretion in r 703(1) to order that costs be assessed on the indemnity basis.
- [9] A recognised circumstance that justifies an order under r 703(1) is where the party against whom the order is sought unreasonably rejects a Calderbank offer.<sup>8</sup> In determining whether a party's rejection of an offer to settle was unreasonable, some guidance may be drawn from the non-exhaustive factors identified by the Victorian Court of Appeal in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)*:<sup>9</sup>

- “(a) the stage of the proceeding at which the offer was received;
- (b) the time allowed to the offeree to consider the offer;
- (c) the extent of the compromise offered;

<sup>4</sup> *Tector v FAI General Insurance Company Ltd* [2001] 2 Qd R 463 at 464 [3] (per curiam).

<sup>5</sup> *Pix v Suncoast Marine Pty Ltd & Anor* [2019] QSC 195.

<sup>6</sup> *Sanderson v Blyth Theatre Company Ltd* [1903] 2 KB 533.

<sup>7</sup> UCPR r 771.

<sup>8</sup> *Colgate-Palmolive Company & Anor v Cussons Pty Ltd* (1993) 46 FCR 225 at 233 (Sheppard J).

<sup>9</sup> (2005) 13 VR 435 at 442 (per curiam).

- (d) the offeree's prospects of success, assessed as at the date of the offer;
- (e) the clarity with which the terms of the offer were expressed;
- (f) whether the offer foreshadowed an application for ... indemnity costs in the event of the offeree's rejecting it."

[10] Also, as was noted by this Court in *Reeves v O'Riley*, "[t]he fact that an appellant has failed on an appeal after an offer to settle has been made does not, without more, warrant an order for indemnity costs."<sup>10</sup>

### Submissions

[11] Mr Pix's submissions can be summarised as follows. The offers were made well in advance of any significant preparation for the appeal and were open for 14 days, which was a reasonable timeframe in the circumstances. They represented a complete compromise and they were clearly expressed. The Riders refused the offers despite the compromise sum, \$884,536, representing the outcome that would have followed if they had only been successful on their second and third grounds of appeal. This figure is said to be significantly less than the amount awarded by the learned Chief Justice. While the Riders were yet to be apprised of Mr Pix's case through the exchange of written submissions, the decisions below set out a clear basis for the findings, without any obvious or manifest error of law. Finally, Mr Pix indicated in his first offer that he would pursue indemnity costs in the event that the Riders rejected his offer and did not obtain a more favourable outcome. A similar intent could be inferred from the nature of the second offer.

[12] In response, the Riders submit that their rejection of Mr Pix's offers was reasonable given that:

1. Mr Pix made the offers at an early stage of the proceeding, which limited their ability to assess them;<sup>11</sup>
2. the offers did not represent a realistic compromise of the proceeding due to their marginal nature;
3. at the date of the offers the appeal had some prospects of success; and
4. they were unaware at the time of the offers that Mr Pix had instructed Senior Counsel.

### Consideration

[13] As to the timing of the offers, the Riders did have an opportunity to make a proper assessment of the offers despite Mr Pix making them at an early stage. This is because there had been a trial of the claim and the Riders had the benefit of the Chief Justice's Reasons at this stage upon which they would have taken advice. Accordingly, the present situation can be distinguished from offers to settle made at

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<sup>10</sup> [2013] QCA 285 citing *Deepcliffe Pty Ltd & Anor v The Council of the City of Gold Coast & Anor* [2001] QCA 396.

<sup>11</sup> The Riders rely upon a number of authorities in their submissions in this respect: *Secretary to the Department of Business and Innovation v Murdesk Investments Pty Ltd (No 2)* [2012] VSC 586; *Globaltech Pty Ltd v Pareek* [2006] WASC 30; *Financial Integrity Pty Ltd v Farmer and Bravium Pty Ltd (No 4)* [2014] ACTSC 145.

an early stage of trial proceedings when the offeree may not yet be apprised of the opponent's case.

- [14] Regarding the nature of the offers, it can be accepted that they were open for a reasonable time and that they were clear. It can also be accepted that Mr Pix indicated to the Riders that he would seek costs on the indemnity basis in the event that they rejected his offers and did not achieve a more favourable outcome than the offered compromise.
- [15] As for the Riders' prospects of success, although this Court dismissed the Riders' appeal, on the date of the offers it could not be said that the Riders' case was without merit. The first ground of appeal required a thorough review of the evidence concerning the Riders' involvement in the construction and sale of the catamaran. The second and third grounds of appeal required consideration of a legal proposition that had not been considered specifically by an Australian appellate court.
- [16] I accept the Riders' submission that Mr Pix's offers did not represent a realistic compromise. Mr Pix offered to accept \$884,536, being 89 per cent of what the Chief Justice had awarded him. In my view, the concession offered was marginal when viewed together with the offer about costs. By his first offer, Mr Pix sought his costs of the trial, and by his "formal offer", he sought his costs of the appeal as well, together with any costs that he would be liable to pay to Suncoast Marine. At that time, the costs of the trial were in dispute. As it turned out, the Chief Justice ordered Mr Pix, despite his success, to pay Suncoast Marine's costs. In my view, given that the Riders' appeal had some merit, it is understandable that they were reluctant to accept offers that presented only a nominal benefit over an outright loss on appeal.
- [17] Having regard to the circumstances of the case, I am unable to find that the Riders unreasonably rejected Mr Pix's offers to settle. There is no reason to depart from the default position in r 702.

### **Disposition**

- [18] In my view, the Riders should pay Mr Pix's costs of the appeal assessed on the standard basis.