SUPREME COURT OF QUEENSLAND

CITATION:	*Harbour Radio Pty Limited & Ors v Wagner & Ors* [2020] QCA 83
PARTIES:	**HARBOUR RADIO PTY LIMITED** ACN 010 853 317 (first appellant) **ALAN BELFORD JONES** (second appellant) **RADIO 4BC BRISBANE PTY LIMITED** ACN 009 662 784 (third appellant) **v** **DENIS WAGNER** (first respondent) **JOHN WAGNER** (second respondent) **NEILL WAGNER** (third respondent) **JOE WAGNER** (fourth respondent)
FILE NO/S:	Appeal No 11072 of 2018 SC No 10830 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Order
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 201 (Flanagan J)
DELIVERED ON:	24 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Fraser and Morrison JJA and Burns J
ORDER:	**The respondents' application for an order that their costs be assessed on the indemnity basis is refused.**
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 OFFER – where the Court dismissed an appeal against injunctions which restrained the appellants from publishing defamatory matter – where the respondents applied for an order that costs ordered in their favour be assessed on the indemnity basis – where the respondents offered to settle the

appeal prior to the hearing – where, if the appellants had accepted the offer, the injunctions against the first and third appellants would have been set aside and the injunction against the second appellant would have been more narrowly expressed – whether the appellants acted unreasonably or imprudently in refusing the offer – whether costs should be assessed on the indemnity basis

Uniform Civil Procedure Rules 1999 (Qld), r 681, r 703(1)

Calderbank v Calderbank [1975] 3 All ER 333, cited
Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) (2005) 13 VR 435; [2005] VSCA 298, cited
J & D Rigging Pty Ltd v Agripower Australia Limited & Ors [2014] QCA 23, cited
Sultana Investments Pty Ltd v Cellcom Pty Ltd (No 2) [2009] 2 Qd R 287; [2008] QCA 398, cited

COUNSEL: R J Anderson QC, with R De Luchi, for the appellants
T B Blackburn SC, with P J McCafferty QC, for the respondents

SOLICITORS: Bennett & Philp for the appellants
Corrs Chambers Westgarth for the respondents

[1] **FRASER JA:** The Court dismissed an appeal by Alan Jones, Harbour Radio Pty Ltd, and Radio 4BC Brisbane Pty Ltd against injunctions ordered by the trial judge which restrained each appellant from again publishing matter and imputations found to be defamatory.[1] The appellants were ordered to pay the respondents' costs of the appeal. The respondents have applied for an order that the costs ordered in their favour be assessed on the indemnity basis rather than on the standard basis.

[2] The main ground of the application is the appellants' failure to accept a *Calderbank*[2] offer made by the respondents. On 21 December 2018 the solicitors for the respondents wrote to the solicitors for the appellants offering to settle the appeal. The offer was expressed to be open for acceptance for 14 days but it was also stated that a request for further time to consider the offer would be considered by the respondents. The letter stated that if the offer was not accepted the respondents intended to rely on the offer for the purpose of seeking an order that the appellants pay the respondents' costs to be assessed on an indemnity basis in accordance with the principles in *Calderbank v Calderbank*. If the appellants had accepted the offer the injunctions against Harbour Radio and Radio 4BC (the radio stations that broadcast Mr Jones' programmes) would have been set aside, the injunction ordered against Mr Jones would have been somewhat more narrowly expressed, and he alone would have been liable to pay the respondents' costs of the appeal on the standard basis.

[3] Pursuant to r 681 of the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**), costs are to be assessed on the standard basis unless the Court orders or the UCPR provides otherwise. Under r 703(1), the Court has a discretionary power to order

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1 *Harbour Radio Pty Limited & Ors v Wagner & Ors* [2019] QCA 221.
2 See *Calderbank v Calderbank* [1975] 3 All ER 333.

that costs be assessed on the indemnity basis. The respondents rely upon the statement in *Sultana Investments Pty Ltd v Cellcom Pty Ltd (No 2)*[3] that where a *Calderbank* offer has been made the courts are inclined to order indemnity costs as an incentive to parties to consider seriously offers to settle which are reasonably made. The mere non-acceptance of an offer to settle does not of itself warrant an order for indemnity costs.[4] As the appellants submit, in *J & D Rigging Pty Ltd v Agripower Australia Limited & Ors*[5] the Court held that non-acceptance of a *Calderbank* offer will justify ordering costs on an indemnity basis only where the party who did not accept the offer acted "unreasonably or imprudently".

[4] The respondents submit that the appellants' failure to accept the offer was imprudent and unreasonable. As they point out, acceptance of the offer would have produced a result for each of the appellants which was more favourable than the result of the appeal in that Harbour Radio and Radio 4BC would not have been bound by the injunctions ordered by the trial judge and the injunction ordered against Mr Jones would have been somewhat more narrowly expressed. The respondents also rely upon the facts that the injunctions ordered by the trial judge were in the form proposed by the respondents in respect of which no issue was raised by the appellants and that the trial judge's findings (which were not shown to be incorrect) established an overwhelming case for the injunctions.[6]

[5] The appellants submit that the application for indemnity costs should be refused because their conduct has not been shown to be imprudent and unreasonable and no special or unusual features justify departure from the usual order that costs are to be assessed on the standard basis. The appellants emphasise that the offer proposed different outcomes in respect of the media companies and Mr Jones but could only be accepted if all three appellants agreed to accept the offer. They submit that although the appeal was dismissed it was reasonably arguable. In that respect the appellants refer to the exceptional character of injunctions against professional journalists and media organisations.[7]

[6] In reply the respondents point out that their offer provided for a relaxation of the scope of the injunctions against Mr Jones and was consistent with the appellants' submission in the appeal that, in the alternative to the injunctions against all appellants being discharged, the injunctions against the media companies should be discharged. The appellants' arguments are submitted to involve a significant departure from the way in which their case was conducted at trial, in which the media companies did not submit that any injunction should be ordered only against Mr Jones, the three appellants were represented by the same solicitors and counsel, they advanced one set of arguments throughout, and they did not suggest any discrimination amongst the appellants of the kind advocated in the appeal.[8]

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3 [2009] 2 Qd R 287 at [15] (White AJA, McMurdo P and Holmes JA as the Chief Justice then was agreeing).

4 See *Rider & Anor v Pix* [2019] QCA 257 at [10] (Flanagan J, Sofronoff P and Morrison JA agreeing), citing *Reeves v O'Riley* [2013] QCA 285 and *Deepcliffe Pty Ltd & Anor v The Council of the City of Gold Coast & Anor* [2001] QCA 396.

5 [2014] QCA 23 at [5].

6 [2019] QCA 221 at [19], [60].

7 [2019] QCA 221 at [54], [60].

8 [2019] QCA 221 at [63].

[7] Some of the factors which have been regarded as supplying guidance upon the question whether a party's rejection of a *Calderbank* offer was unreasonable[9] are present in this case and supply some support for a view that the appellants' rejection of the respondents' offer was unreasonable: substantial costs would have been saved if the offer had been accepted and the appellants should have been in a good position to assess the strength of their appeals; a reasonable time was allowed to the appellants to consider the offer; the extent of the compromise offered was substantial for the media appellants and it was not insignificant for Mr Jones; the terms of the offer were clearly expressed; and the offer foreshadowed an application for indemnity costs if the appellants rejected it and failed in their appeals.

[8] Notwithstanding those matters, I am not persuaded that the exceptional order for assessment of costs on the indemnity basis should be made. First, the way in which the appellants conducted their case at trial could not affect the entitlement of each appellant to decide whether or not to accept the *Calderbank* offer, but the respondents' offer could be accepted only if all appellants accepted it. Secondly, the rejection of the appellants' grounds of appeal does not of itself suggest that any appellant did not have a reasonably arguable basis for pursuing an appeal against the trial judge's decision to grant injunctions against the appellants. The rejection of those grounds of appeal followed upon an extensive and detailed analysis of the factual and legal issues raised in the appeals and evaluative decisions that the trial judge's reasons for granting injunctions were not inadequate and the strength of the respondents' case justified the unusual course of restraining publications by a professional journalist and media defendants.

[9] I would refuse the respondents' application for an order that their costs be assessed on the indemnity basis.

[10] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the order his Honour proposes.

[11] **BURNS J:** I agree.

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9 *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435 at 442, applied by this Court in cases which include *Rider & Anor v Pix* [2019] QCA 257.