SUPREME COURT OF QUEENSLAND

CITATION:	*Mitchell v Pacific Dawn P/L* [2003] QSC 179
PARTIES:	**BRUCE JOSEPH MITCHELL** (plaintiff) **v** **PACIFIC DAWN PTY LTD** ACN 070 358 280 (defendant)
FILE NO/S:	S 3872 of 2001
DIVISION:	Trial Division
PROCEEDING:	Order for Costs
DELIVERED ON:	12 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	4 April 2003
JUDGE:	B W Ambrose J
ORDER:	**I order that the defendant pay to the plaintiff his costs of and incidental to the proceedings to answer the questions posed, to be assessed on an indemnity basis**
CATCHWORDS:	COSTS – indemnity costs – where plaintiff succeeded against defendant – whether determination of questions constitutes final relief – where plaintiff had made offer to settle – whether defendant can show order other than indemnity costs appropriate under UCPR 360 *Uniform Civil Procedure Rule*s 1999 (Qld), Part 5, r 353, r 360, r 361, r 361(3), r 483, r 485, r 658, r 659 *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225, considered *Davies v Fay* [1995] 1 Qd R 509, considered *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397, considered *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608, considered
COUNSEL:	P J Dunning for the plaintiff S R Lumb for the defendant
SOLICITORS:	Primrose Couper Cronin Rudkin for the plaintiff Lethbridge Hogan O'Hanlon for the defendant

[1] **AMBROSE J:** On 4 April 2003 the plaintiff succeeded against the defendant upon proceedings taken by the plaintiff pursuant to an order made under UCPR 483 for

the determination of two questions recited in para 8 of the Reasons for Judgement. The first question was whether "any legally binding agreement" resulted from a meeting held on 22 December 2000. The second question was whether "any agreement of the kind alleged" in the defence was arrived at by the application of improper economic duress by the defendant to the plaintiff so as to render it unenforceable.

[2] For the defendant it is contended that it succeeded with respect to the first question but failed with respect to the second question.

[3] In my view such a contention is rather superficial because the first question required the determination of two issues. The first issue was whether any consideration passed from the defendant to the plaintiff and the second depended upon whether if it did, any resulting agreement was "legally binding" – having regard to the real issue debated on this application which was whether the agreement resulted from the application upon the plaintiff of improper economic duress by the defendant.

[4] Indeed reference to the answer to the first question (*vide* para 77 of the Reasons for Judgment) makes it clear that minimal consideration did pass from the defendant to the plaintiff and the agreement was binding subject to the determination of the issue of the application of unconscionable conduct and/or economic duress exercised by the defendant upon the plaintiff.

[5] That determination was in favour of the plaintiff that the defendant had been guilty of unconscionable economic duress which led to the making of the agreement of 22 December 2000.

[6] In my view far from the defendant succeeding in respect of the answer given to the first question in fact it failed. The answer to the first question clearly enough determined that although minimal consideration had passed from the defendant to the plaintiff the agreement actually reached was enforceable only if economic duress was not established and indeed the very nature of the minimal consideration given for the enormous monetary entitlement which the plaintiff forewent really led to the almost inevitable answer of the second question in favour of the plaintiff.

[7] In the exercise of my discretion with respect to costs I reject entirely the contention advanced on behalf of the defendant that it succeeded in any practical sense in respect of the answers given to those questions.

[8] On 23 August 2002 the solicitors for the plaintiff made an offer under part 5 of the UCPR to settle the proceedings it had commenced pursuant to the order made under UCPR 483. In relevant respects the offer was in the following terms.

> "Accordingly, the offer that is made under Part 5 of the *Uniform Civil Procedure Rules,* and particularly **r**ule 353, is that the plaintiff is prepared to settle the issue to be determined by Judge Ambrose on the basis that the defendant agrees:
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> 1. That the meeting on 22 December, 2000, as referred to in paragraph 14 of the Defence and paragraph 13 of the Reply, did not result in any legally binding agreement in the terms alleged in paragraphs 13 to 16 of the Defence.

2. That if an agreement of the kind alleged in paragraphs 13 to 16 of the Defence was entered into, it was arrived at by the application of such improper economic duress by the defendant on the plaintiff as to render it unenforceable as alleged in paragraph 13 of the Reply.

3. The defendant pay the plaintiff's costs of and incidental to the hearing on a standard basis.

This offer is open for acceptance for a period of 14 days from the date hereof and may be accepted by serving written notice on me as the plaintiff's solicitor."

[9] In my judgement having rejected the defendant's contention that really two quite distinct questions were answered, on the basis that the answer to question two really determined the answer to question one, the plaintiff did wholly succeed on the proceedings the parties instituted under UCPR 483. In my view the offer he made on 22 August 2002 the terms of which I set out in para 8 hereof *prima face* complied with the requirements with UCPR 353. If it did come within that rule then UCPR 360 requires an order that the defendant pay the plaintiff's costs on an indemnity basis unless it shows another order for costs is appropriate.

[10] Looked at very broadly the real issue between the plaintiff and the defendant upon this application was whether the plaintiff in this action is able to pursue monies alleged to be owing to him upon a cost plus building contract or whether as a consequence of a legally effective and binding compromise agreement (ie one not arrived at by the application of economic duress/unconscionable conduct on the part of the defendant), the plaintiff is entitled to recover from the defendant only a sum significantly less than the plaintiff was then claiming and now seeks to recover.

[11] The questions to be determined were agreed by the parties to be appropriate on the facts in dispute between them. Their determination involved the calling of much evidence – which with submissions in the case occupied four days.

[12] Whether the determination of the plaintiff's claim which will involve the establishment of the cost of the construction of the defendant's building incurred by the plaintiff plus 7.5% of that cost will take four days or more is impossible to say. As a consequence of the determination of the questions in this action on 4 April 2003 one might expect that the action will proceed as do most actions of its sort. It may well be the case that its determination will not involve a judge of this court analysing in detail the costs incurred in providing materials, paying subcontractors etc in the construction of the defendant's building.

[13] It is unnecessary however for me to consider or indeed at this stage speculate upon how the issues remaining on the pleadings between the parties will ultimately be determined.

[14] For the defendant it is contended that the plaintiff should be ordered to pay the costs of the defendant on the first question and that the defendant should be ordered to pay the plaintiff's costs of the second question. It is contended that costs in each case ought be assessed on the standard basis.

[15] In the alternative it is contended that there should be no order for costs made upon the determination of this matter which consumed 4 days of court time. In the further alternative it is contended that the defendant should be ordered to pay no more than 50% of the plaintiff's costs of the hearing of "the preliminary questions" to be assessed on a standard basis.

[16] In my view to so analyse the outcome of the proceedings would be to adopt a very technical and superficial approach.

[17] The answer to both questions necessarily involved a determination of the sole question posed by question two. Indeed this appears from the very terms of the answer to question one.

[18] The defendant suggests that the determination of the questions ordered to be determined by way of interlocutory proceeding should not be construed as a "judgment" within UCPR 659.

[19] In my view the answers to the questions posed in this case do finally determine a significant if not the principal factual issue raised by the defendant in defence of the plaintiff's claim against it.

[20] UCPR 485 permits a court to give judgment including a declaratory judgment or to make any other order; it may dismiss a proceedings in whole or in part.

[21] Unless compelled by authority to hold to the contrary I would conclude that the answers to the questions in this case pursuant to the order made for their determination, do constitute a "judgment" at least for the purpose of UCPR 360. They do in fact constitute "final relief" in respect of the issue raised by the defendant in its defence – within the meaning of UCPR 659. In effect the defence raised by the defendant sought to prevent the plaintiff from pursuing any claim against the defendant in respect of monies due under the building agreement except one solely upon only the right he had under the compromise agreement. If such defence had been available, the plaintiff would have been prevented from proceeding to recover a very large sum of money over and above that to which arguably he would have been entitled had the compromise agreement been binding upon him. To the extent then that the answer to those questions prevents finally the defendant relying upon such a defence the answers have in many respects the same consequences as a final judgment. The consequences are "final" in the sense that one particular issue pleaded by the defendant has been finally determined – subject of course to the outcome of any appeal.

[22] The consequence of accepting the defendant's contention would be that one would have to distinguish between an "order" and a "judgment" for the purpose of the application of UCPR 360. The terms of UCPR 658 recognise that whether an order is made or a judgment is delivered will depend upon the nature of the case or proceeding which leads to the making of that order or the giving of that judgment.

[23] In my judgment the rules provide no obstacle to the plaintiff in this case obtaining an order for indemnity costs.

[24] The defendant contends that a real problem for the plaintiff to overcome is the date upon which the offer was served.

[25] The offer was not served until 23 August 2002 – three days after the hearing had commenced, however it was served well before the fourth day of the hearing on 27 September 2002.

[26] UCPR 360 does not make any provision as to the effect of a plaintiff serving an offer to settle during the course of a trial as does UCPR 361(3) with respect to an offer made by a defendant to settle. It is interesting to note however that when a defendant makes a qualifying offer, a plaintiff is entitled to costs on a standard basis up until the opening of the court on the next day of the trial after that offer has been made. The defendant however is then entitled to its costs incurred after the opening of the court on that day on an indemnity basis.

[27] The offer made was open for acceptance for a period of 14 days – ie expiring well before the date fixed for the fourth day of the proceedings – 27 September 2002.

[28] The failure by a defendant to accept a plaintiff's qualifying offer will generally result in the whole of the plaintiff's costs being taxed on an indemnity basis – and not just those costs incurred after the making of the offer. However a court has power to make a different order if it thinks it "appropriate" – *Davies v Fay* [1995] 1 Qd R 509. The rights of a plaintiff against a defendant under UCPR 360 are more extensive than those of a defendant in a similar position under UCPR 361. However that may be, it seems to me on the proper application of UCPR 360, that I am required unless good reason is shown by the defendant to the contrary to order that the defendant pay to the plaintiff his costs of and incidental to the proceedings conducted pursuant to the order made by consent on 7 September 2001 to be assessed on an indemnity basis.

[29] In my view an offer to settle within the contemplation of UCPR 353, non acceptance of which will lead to an order for indemnity costs, will not include an "offer" by one party to accept the whole of the relief it seeks in its claim or application – particularly where the nature of the relief claimed is such that it will be either granted or refused unconditionally. The making of a purported offer on the terms of that recorded in para 8 hereof is not designed "to settle" or compromise any issue between the parties. In effect it required the complete capitulation of the defendant. It did not involve anything less than the defendant's abandonment of a critical part of its defence. If the plaintiff's contention be correct, the making of that "offer" had the effect of making the defendant liable for indemnity costs if it failed but entitled only to standard costs if it succeeded. Even if upon its proper construction UCPR 353 would theoretically permit the award of indemnity costs on the basis of the "offer" recorded in para 8 hereof, in my view without something else, it would be "inappropriate" to make such an award.

[30] However having regard to my assessment of Mr Fan the director of the defendant, and its architect its principal witness and I have already dealt with my assessment of those witnesses in my reasons for judgment, it suffices to say that the answers to the questions involved the determination of facts in dispute in which assessment of the credibility of the witness was critical.

[31] While the merits of the plaintiff's claim against the defendant was not of course canvassed upon this proceedings, I did have the opportunity to assess the merits of the defendant's case based upon the so called compromise agreement. On my assessment of that case the defendant had no merits and its defence in this Court

was raised merely to implement the threat it made at the time of the compromise agreement, that if the plaintiff did not accept the sum offered, then the defendant would litigate his entitlement to payment for the work he had performed in this court and that litigation would postpone for a significant period of time, payment of the monies to which he was entitled.

[32] There are many authorities dealing with the circumstances in which indemnity costs will be ordered against a party to an action – quite irrespective of the making of offers to the other by the successful party to settle the action on terms less favourable than the judgment obtained. Those matters which justify an order for indemnity costs were considered in *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225. Those principles have been considered and applied more recently in *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 and *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608.

[33] While it may not be in every case in which a party to proceedings has attempted to enforce the consequences of unconscionable conduct or the exercise of economic duress that an order for indemnity costs will be made, in this case my assessment of the defendant's conduct is based to no small degree upon my assessment of Mr Fan and his architect Mr Tan and I infer that the defendant sought to achieve by its conduct, and indeed by the pursuit in this court of arguments designed to avoid a proper assessment of its monetary obligations to the plaintiff, under the building contract. I am persuaded to make an order for indemnity costs disregarding any effect the making of the offer under UCPR 360(1) might have had. Certainly I have been unpersuaded by the defendant in the circumstances of this case that another order for only standard costs would be appropriate.

[34] I order therefore that the defendant pay to the plaintiff his costs of and incidental to the proceedings to answer the questions posed, to be assessed on an indemnity basis.