SUPREME COURT OF QUEENSLAND

CITATION:	***Brian Geaney Pty Ltd & Anor v Close Constructions Pty Ltd & Ors*** **[2003] QSC 424**
PARTIES:	**BRIAN GEANEY PTY LTD ACN 010 651 546** (First Plaintiff) and **THE PROPRIETORS 102 DENHAM STREET, BUILDING UNITS PLAN NUMBER 100002** (Second Plaintiff) v **CLOSE CONSTRUCTIONS PTY LTD ACN 010 963 407** (First Defendant) and **PAUL CRUICE ARCHITECT PTY LTD ACN 018 188 100** (Second Defendant) and **CYRIL CASWELL** (Third Defendant)
FILE NO:	S478 of 2002
DIVISION:	Trial Division
DELIVERED ON:	11 December 2003
DELIVERED AT:	Rockhampton
HEARING DATES:	28-29 November 2002, 24-28 March 2003, 16 June 2003, 23 June 2003 and 13-15 August 2003
JUDGE:	Dutney J
ORDERS:	1. The defendants to pay the plaintiff's costs of and incidental to the action to be assessed on the standard basis applicable to an action in the District Court where the amount recovered is $69,529.00; 2. The plaintiff to pay the defendants' reserved costs of 16 June 2003 to be assessed on the standard basis; 3. As between defendants, the second defendant is entitled to be indemnified by the first and third

defendants for costs paid by it which exceed 40% of the plaintiff's standard costs in the same proportions the first and third defendants are required to indemnify the second defendant for the judgement amount.

CATCHWORDS: COSTS – OFFERS TO SETTLE – where offers made before the trial by each party – where offer made by first and third defendants was less than amount recovered – whether such offer sufficient to displace the usual costs entitlement of a successful plaintiff – where offer made by second defendant more than amount recovered but included an uncertain amount for costs – where unable to determine whether offer (including costs) more or less favourable than judgement – whether second defendant entitled to standard costs from the date of the offer

Uniform Civil Procedure Rules, R 698(2)
Calderbank v Calderbank [1975] 3 All ER 333, discussed

COUNSEL: PO Land for the Plaintiff (28-29 November 2002, 24-28 March 2003, 16 June 2003, 23 June 2003
IR Perkins for the Plaintiff (13-15 August 2003)
MB Smith for the First Defendant (28-29 November 2002)
First Defendant self represented (24-28 March 2003, 16 June 2003, 23 June 2003 and 13-15 August 2003)
RA Perry for the Second Defendant
Third Defendant self represented

SOLICITORS: SR Wallace & Wallace for the Plaintiff
Colin Fleming & Co for the First Defendant (28-29 November 2002) thereafter self represented
Thynne & Macartney for the Second Defendant
Third Defendant self represented

[1] On 21 November 2003 I gave judgement in this action for the plaintiff against the first, second and third defendants for the sum of $18,000.00 and against the first defendant for the additional sum of $51,529.00. In the ordinary course of events, that is, in the absence of any relevant settlement offer, the plaintiff would be entitled to costs against each defendant to be assessed on the standard basis. In the case of the first defendant, those costs would be at a rate applicable to a judgement for the sum of $69,529.00 in the District Court. I would ordinarily also award costs against the other two defendants on the

same basis. Even though the amount recovered was within the jurisdiction of the Magistrates Court the issues in the action overlapped as against all the defendants and it was appropriate to sue all three in one action. That action should have remained in the District Court where it was commenced.[1]

[2] Even though the plaintiff was unsuccessful against the second and third defendants in relation to the claims for above ground defects in the building, the evidence in relation to the defects in the foundations and above ground was interwoven in such a way that no sensible disentanglement of costs could be achieved. In any event, the plaintiff was successful on all issues against one or more of the defendants. Since all were proper parties to the proceedings the overall length of the trial was not greatly affected.

[3] In this case submissions were invited on costs in the light of what I was told were relevant offers made before the trial by each party.

[4] The first offer was made on 28 June 2002 and was for a sum of $50,000.00 jointly on behalf of the first and third defendants. Since the offer was made jointly and required the discharge of both defendants, and the amount recovered against the first defendant exceeded the offer by a substantial amount, the offer is not sufficient to displace the usual costs entitlement of a successful plaintiff.

[5] On 11 March 2003 the second defendant made an offer to settle the claim against it for the sum of $25,000 plus some costs. There was an alternative the plaintiff could have accepted. That was for the actual cost of articulation and shrinkage joints and rectification of cosmetic damage. On the basis of my judgement this was substantially less than $25,000. The costs offered were to be on "the appropriate scale". No such scale was identified so I presume the Magistrates' Court scale was intended.[2] The costs involved were 100% of the costs specific to the claims for articulation and shrinkage joints, a further

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1 *Uniform Civil Procedure Rules* rule 698(2) relates only to the relief in the proceeding. It does not separate claims against individual defendants in the same action.

2 See *Uniform Civil Procedure Rules* rule 698(2).

amount for "items of costs that are common to all defendants" in the proportion that $25,000 bore to the total amount recovered for those items. These costs excluded costs incurred on specific claims against the first and third defendants.

[6] The second defendant successfully defended the issues in relation to which it offered to pay 100% of the costs. The first defendant, which was found liable for the shrinkage and articulation joint problems, did not really contest that such joints should have been installed, but were not. In any event, the evidence in relation to the defects in the foundations and above ground (including shrinkage and articulation joints) was inextricably linked. All of the engineers called dealt with the matters comprehensively. In other words, they dealt with the foundations for which the second defendant was liable along with the cosmetic defects, the lack of control joints and the lack of lateral support in a single report. Therefore, even if it were possible to separate any costs specifically referable to a particular alleged defect, which I doubt, those costs would be negligible. By 11 March 2003 the trial had already commenced. The hearing proceeded over two days on 28 and 29 November 2002. It was then adjourned until 24 March, 2002 where five days were allocated. On 16 June 2003 the action could not proceed because of the incapacity of the plaintiff's counsel. On 23 June 2003 the second defendant brought an application for summary judgement which was unsuccessful. Costs of that application were previously dealt with. There were three subsequent days on which evidence was taken.

[7] If, by "items of costs that are common to all defendants", the second defendant meant only items of costs specifically referable to issues on which all defendants were liable either by judgement or agreed payment to the plaintiff, the problem is again that such items cannot be separated from the general costs because of the way the action was conducted by all sides. However, it is looked at, the offer is for something less than 100% of costs.

[8] The offer was one made in reliance on the decision in *Calderbank v Calderbank*[3]. It could not be an offer under Chapter 9 Part 5 of the Uniform Civil Procedure Rules because the offer closed on 21 March 2003, less than 14 days after it was made. *Calderbank* offers are a powerful discretionary consideration in the determination of the appropriate costs order. They should not, however, in my view, as a general proposition, entitle the maker to a better outcome than would have been available if an offer under the rules was made. An offer made under Chapter 9 Part 5 of the UCPR, if not accepted, entitles a defendant who makes it to standard costs from the date the offer is made, but only if the plaintiff's recovery is not more favourable than the offer.

[9] Determination of the value of the offer in this case is complicated by the unwieldy and, in my view, unrealistic, offer in relation to costs. The judgement sum offered exceeded the judgement obtained against the second defendant by $7,000. The value of the costs order offered is, as I have understood it, dependant on the value of costs which can be identified as relevant to specific issues. It is thus of doubtful value for the reasons I have already indicated. Even if costs were awarded on the Magistrate's Court scale applicable to a judgement for $18,000, the total of items 1, 5(a), 6(f), 6(h) and 8(a) comes to over $6,000 for the two days of hearing before the offer was made. It may be that there are other relevant scale items and there are also the outlays for the engineering reports from Mr Perkins and Mr Stanaway, and the cost of the engineers conferring before the trial. The total would certainly exceed $7,000 by a significant amount.

[10] While, in the end, having regard to the costs spent after the offer was made by the second defendant, the plaintiff may well be worse off as a result of not having accepted the offer, this conclusion depends on valuing the costs paid by the plaintiff to its solicitors and counsel pursuant to their private arrangements and comparing this with costs assessed on the standard basis. That would not be a proper exercise to embark on. In the end, I consider the proper enquiry is to determine whether the amount recovered together with the

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3 [1975] 3 All ER 333.

value of the appropriate costs order up to 11 March 2003, as I have indicated above, was more or less favourable than a sum of $25,000 plus the rather odd offer in relation to costs made by the second defendant. As a result of the difficulty with the costs portion of the offer, and somewhat reluctantly, I cannot conclude that in fact the ultimate recovery by the plaintiff was not more favourable than the offer when costs are take into account. Because of the way the costs offer was framed it was never possible for the plaintiff to quantify it with any confidence and therefore give it a value. It had to be worth less than standard costs on the District Court scale on any view.

[11] In the result, I do not consider the offers made in this case are sufficient to displace the ordinary position regarding costs. Hence, I order the defendants to pay the plaintiff's costs of and incidental to the action to be assessed on the standard basis applicable to an action in the District Court where the amount recovered is $69,529.00. The defendants are entitled to their costs of the adjourned hearing on 16 June 2003. Even though the adjournment was not a matter within the plaintiff's control, it is not a cost the defendants should bear. I order to plaintiff to pay the defendants' reserved costs of that day to be assessed on the standard basis.

[12] Liability as between the defendants for the sum in which judgement was obtained against all of them was apportioned 20% to the first defendant, 40% to the second defendant and 40% to the third defendant. The second defendant is entitled to the benefit of the same contribution pursuant to its notices of contribution or indemnity. As between defendants, the second defendant is entitled to be indemnified by the first and third defendants for costs paid by it which exceed 40% of the plaintiff's standard costs in the same proportions the first and third defendants are required to indemnify the second defendant for the judgement amount.