# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Martin v Rowling & Anor* [2004] QSC 286 |
| PARTIES: | **JULANNE MARY MARTIN**<br>(plaintiff)<br>v<br>**HELEN ROWLING**<br>(first defendant)<br>and<br>**SUNCORP METWAY INSURANCE LIMITED (ACN 075 695 966)**<br>(second defendant) |
| FILE NO/S: | S 3606 of 2000 |
| DIVISION: | Trial |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court Brisbane |
| DELIVERED ON: | 8 September 2004 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 1 September 2004 |
| JUDGE: | Douglas J |
| ORDER: | **1. That the second defendant pay the plaintiff's standard basis costs of the proceeding to be assessed on the Supreme Court scale until 11 December 2002;**<br>**2. That the plaintiff pay the first and second defendants' costs, including reserved costs, to be assessed on a standard basis according to the Supreme Court scale from 12 December 2002 up to and including today;**<br>**3. I certify that the first and second defendants recover their costs of defending the proceedings with an allowance for both senior and junior counsel.** |
| CATCHWORDS: | PROCEDURE – COSTS - DEPARTING FROM THE GENERAL RULE - CONDUCT OF PARTIES - DEMAND, OFFER AND CONSENT – Where the defendant made an offer to settle – Offer refused by the plaintiff – Where the defendant obtained a judgment more favourable than the offer – Whether a costs order pursuant to r 361(2) of the *Uniform Civil Procedure Rules 1999* (Qld) is appropriate in the circumstances |

*Uniform Civil Procedure Rules 1999* (Qld), r. 361

*Castro v Hillery* [2003] 1 Qd R 651, followed
*McChesney v Singh* [2004] QCA 217, applied
*Morgan v Johnson* (1998) 44 NSWLR 578, followed

COUNSEL: Mr G R Mullins for the plaintiff
Mr S Jensen (solicitor) for the defendants

SOLICITORS: McInnes Wilson Lawyers for the plaintiff
Jensen McConaghy Solicitors for the defendants

[2] **DOUGLAS J:** On 9 June 2004 I gave judgment for the plaintiff in this matter for $330,668.39 as damages for negligence. The parties have now made submissions in respect of costs. The defendant made an offer to settle for $450,000 plus costs on 11 December 2002. Having obtained a judgment more favourable than that offer, the defendant seeks an order that it pay the plaintiffs' costs up to 11 December 2002 and that the plaintiff pay the first and second defendants' costs, including reserved costs, from 12 December 2002 pursuant to r. 361(2) of the *Uniform Civil Procedure Rules*. The plaintiff argues that such an order is not appropriate in the circumstances.

**The circumstances**

[3] The defendant's offer not having been accepted, the matter proceeded to trial and was due to be heard on 4 August 2003 before McMurdo J. During the opening the plaintiff's counsel became aware that certain documents that had been subpoenaed from the plaintiff's former employer, a firm known as Merck Sharp & Dohme ("MSD"), included a significant number that had not been obtained from an earlier non-party disclosure application. The new documents dealt in more detail with allegations about the plaintiff's performance in her employment by MSD and the reasons why she left that position.

[4] That was already an issue in the litigation. The plaintiff had claimed in her statement of loss and damage to have been forced to resign by her employer because she was unable to complete her employment duties due to the injuries she suffered in the accident. The defendant's case was to be that her injuries had nothing whatever to do with the circumstances in which she left. That was a view that I accepted in my earlier reasons for judgment at [6]. These newly disclosed documents required the plaintiff's lawyers to seek an adjournment to investigate the allegations in them. The adjournment was granted.

[5] The plaintiff, at that stage, did know something of the allegations made against her about the termination of her employment through her own knowledge of the events that led up to her leaving her position and from documents that had been disclosed under the notice of non-party disclosure. She did not know of the number of people making allegations against her and of the detail, particularly in some written complaints made shortly before she left. One of the documents that was revealed on non-party disclosure, however, was a memorandum of 25 June 1998 that became ex. 47 at the trial. It makes it clear that her superiors were dissatisfied with her

performance and continued to be so after November 1997 until June 1998 when she left the position.

[6] A copy of that memorandum was produced by her counsel before McMurdo J and the defendants' counsel asserted without contradiction before his Honour that she had been in possession of the document already by then for 3 years; see T. 7-9 of that hearing on 4 August 2003. It seems clear, therefore, that, at the time of the offer, Ms Martin was aware of dissatisfaction with her performance in November 1997 and the non–party disclosure at least had enlightened her to the existence of the issue as to the circumstances in which she left her employment and the extent to which it was accident related. She also knew that one of her superiors, a Mr Lawler, was not well disposed to her in June 1998; see the submissions of Mr Williams QC to McMurdo J of 4 August 2003; T. 5 ll. 30-35, T. 13 ll. 25-60.

[7] In the final analysis I concluded that the resolution of the dispute about the circumstances in which she left her employment with MSD did not affect the assessment of her damages to any great degree; see at [2] of my decision of 9 June 2004. Nevertheless, as Mr Mullins correctly points out on behalf of the plaintiff my conclusions from that evidence of her ability as a manager were significant to some extent in the assessment of future economic loss; see at [9] and [19].

[8] Ms Martin has sworn in an affidavit filed by leave on 1 September 2004 that, after receipt of the subpoenaed documents from MSD and after the delivery of an amended defence on 25 September 2003, she was advised by her solicitors that the link between the accident and the resignation from her employment and her general credit was likely to be substantially challenged in any trial and that the costs associated with the trial by reason of the additional evidence and the risk of the award of damages going under the offer were significantly increased. Accordingly she instructed her solicitors to offer to settle the matter for the same amount as the defendants had offered on 11 December 2002, $450,000 plus costs. That offer was made on 5 January 2004. By then the amount of costs involved had increased significantly from those incurred by the defendant since the date of its offer. The defendant did not accept that offer by the plaintiff and the matter proceeded to trial. The plaintiff had previously offered to settle, on 26 May 2003, for $550,000 and costs.

[9] The amended defence was delivered after the hearing before McMurdo J to meet the demands of the *Uniform Civil Procedure Rules* rather than the previous *Rules of the Supreme Court*. It sets out allegations which the plaintiff would not have been aware of simply from the previous pleadings and which were relevant to the advice given to her by her solicitors in respect of the increased risk of litigation after the disclosure of the further material in August 2003. But the main issue that is important for present purposes is the further information she obtained from the subpoenaed documents.

[10] The second defendant, Suncorp-Metway Insurance Limited, relies upon r.361 of the UCPR on the basis that the plaintiff obtained a judgment that was not more favourable to her than the offer to settle made by the second defendant on 11 December 2002. In those circumstances, unless she can show that another order as to costs is appropriate in the circumstances, I must order the second defendant to pay her costs on the standard basis up to and including the day of service of the

offer to settle and order her to pay the defendants' costs on the standard basis after the day of service of the offer to settle.

**Is another order appropriate?**

[11] The issue is whether the production of these further documents by MSD on subpoena at the hearing before McMurdo J and the consequences for the plaintiff's case of their production create circumstances where another order as to costs is appropriate under r.361(2).

[12] Mr Mullins, for the plaintiff, drew my attention to the principles stated by Williams JA in *Castro v Hillery* [2003] 1 Qd R 651, 664 at [75] that a procedure such as an offer to settle must be evaluated in the light of circumstances as they exist at the time the offer is made. His Honour went on to say that where circumstances have changed leading to a significant difference in a plaintiff's claim and thus significantly altering the risks to the defendant there would have to be careful analysis before a proper exercise of discretion could result in indemnity costs being ordered. That comment was made in the context of a discussion about the proper application of O.26 r.9(1) dealing with the situation where a defendant needed to show that another order for costs was proper in the circumstances.

[13] Here it is the plaintiff who needs to show another order is appropriate. Nonetheless, in similar circumstances to the present, in *McChesney v Singh* [2004] QCA 217, the Court said at [12], when referring to *Castro v Hillery,* that it relied on the observations there that the need to consider whether the recipient of the offer has had an informed opportunity to assess the chances of either side doing better than the offer was relevant to the exercise of the discretion and went on to say that this was to be assessed in the light of the circumstances as they existed at the time of the offer.

[14] The Court also referred to the consideration of a similar issue in New South Wales in *Morgan v Johnson* (1998) 44 NSWLR 578, 581-582 where their Court of Appeal (omitting the references to earlier authorities) set out the following principles to guide the exercise of the discretion under their rules:

> "(1) The purpose of the rule is to encourage the proper compromise of litigation, in the private interests of individual litigants and the public interest of the prompt and economical disposal of litigation: ...
>
> (2) The aim is to oblige the offeree to give serious thought to the risk involved in non-acceptance: ...
>
> (3) The prima facie consequence of non-acceptance will be that the rule will be enforced against the non-accepting party: ... This is because, from the time of non-acceptance 'notionally the real cause and occasion of the litigation is the attitude adopted by [the party] which has rejected the compromise' : ...
>
> (4) Lying behind the rule is the common knowledge that 'litigation is inescapably chancy' : ... For this reason, the ordinary provision is expected to apply in the ordinary case: ... The mere fact that it was reasonable for the litigant to take the view that he or she did in rejecting the offer is not enough to displace the rule: ..."

[15] The main issue for the plaintiff on my analysis of the case was the extent of the physical disability from which she continued to suffer as a result of her accident. That is significant in assessing the relative importance of the effect of the late disclosure of the subpoenaed documents. The principal risk that she faced when the defendants' offer was made was non-acceptance of her case in respect of the extent of her disability. She was aware of the risk that her future loss might be attributable at least partly to her performance as an employee but the real risk then and at the trial related to her physical capacity to perform work and its effect on her future earning capacity. The circumstances of her leaving MSD had not stopped her from finding well paid employment.

[16] Here, therefore, where the plaintiff was faced with a dispute among the medical witnesses about the consequences of her injury, was aware that there was a dispute about the reason for the termination of her employment by MSD in June 1998 and was aware of evidence from an early stage putting in issue her performance as an employee leading up to that termination, the mere fact that the evidence of the reasons for that termination was strengthened by the appearance of further subpoenaed documents after an offer had been made, is not enough, in my view, to enliven the discretion to make another order for costs than that prescribed by r.361(2).

[17] Although the new documents may well have lengthened the trial beyond what was likely had they not been produced, the issue had always been there and was capable of further investigation by the plaintiff; see the transcript before McMurdo J of 4 August 2003 at T. 13-14.

[18] The main issue where she failed to succeed as much as she hoped was in respect of the effect of her continuing disability on her ability to work. She should be taken to have accepted that risk when considering and rejecting the defendant's offer. The appearance of the additional documents on 4 August 2003 did not, in my view, sufficiently change the information that was available to the plaintiff when the offer was made on the subsidiary issue related to the termination of her employment so as to allow me to change the order for costs from the one that the rule normally requires. In that respect the approach applied in New South Wales, that the prima facie consequence of non-acceptance will be that the rule will be enforced against the non-accepting party whose attitude in rejecting the compromise has been the real cause and occasion of the litigation and the consideration that it is common knowledge that "litigation is inescapably chancy" become important.

[19] The costs of the adjourned hearing before McMurdo J were reserved. Those costs were incurred by the defendants well after their offer was made. Had it been accepted those costs would not have been incurred by them. Although they would also not have been incurred had non-party disclosure been made of the documents produced pursuant to the subpoena from Merck Sharp & Dohme, as between the parties to the action it is my view that those costs should be paid by the plaintiff to the defendants.

[20] It was also submitted that no allowance should be made for senior counsel. It seems to me that it was appropriate to brief two counsel in a matter of this nature. The evidence was extensive and, with the submissions, extended over 6 days. The case covered what could be viewed notionally as a dispute concerning the dismissal of the plaintiff from her employment as well as the dispute concerning the medical

consequences of her accident. Both issues were the subject of a large number of documents and evidence and required close attention during the evidence and submissions. There was also a useful division of function between counsel engaged on behalf of the defendants in respect of those issues and a significant amount of money claimed; the plaintiff's submissions sought damages of almost $1 million. Before McMurdo J the plaintiff had been represented by two counsel. In those circumstances I believe that it was appropriate that two counsel be briefed for the defendants.

[21] Accordingly, I order:

1. That the second defendant pay the plaintiff's standard basis costs of the proceeding to be assessed on the Supreme Court scale until 11 December 2002;
2. That the plaintiff pay the first and second defendants' costs, including reserved costs, to be assessed on a standard basis according to the Supreme Court scale from 12 December 2002 up to and including today;
3. I certify that the first and second defendants recover their costs of defending the proceedings with an allowance for both senior and junior counsel.