SUPREME COURT OF QUEENSLAND

CITATION:	*Jones & Anor v Millward & Anor* [2005] QCA 76
PARTIES:	**RICHARD LAURENCE JONES and ELIZABETH ANN JONES** (plaintiffs/appellants) **v** **MARK VINCENT MILLWARD and ROSEMARY JANE LEA** (defendants/respondents)
FILE NO/S:	CA No 7917 of 2004 SC No 563 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EX TEMPORE ON:	21 March 2005
DELIVERED AT:	Brisbane
HEARING DATE:	21 March 2005
JUDGES:	McMurdo P, Jerrard JA and Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	PROCEDURE – COSTS – APPEALS AS TO COSTS – MISTAKE OF LAW OR FACT – where specific performance granted by trial judge– where plaintiffs made offer before trial to defendants to specifically perform the contract the subject of the action and pay the plaintiff's costs on a standard basis – where successful plaintiffs sought indemnity costs on the basis that their offer constituted an offer to settle under r 360 *Uniform Civil Procedure Rules* 1999 (Qld) - whether an offer to accept the whole of the relief sought in a claim for specific performance is an offer to settle for the purposes of r 360 *Uniform Civil Procedure Rules* 1999 (Qld) *Uniform Civil Procedure Rules* 1999 (Qld), r 5(1), r 360 *Colgate Palmolive Co & Anor v Cussons Pty Ltd* (1993) 118 ALR 248, considered *Hobartville Stud v Union Insurance Co Ltd* (1991) 25

NSWLR 358, considered
Mitchell v Pacific Dawn Pty Ltd [2003] QSC 179; Ambrose J, SC No 3872 of 2001, 12 June 2003, applied
Tickell v Trifleska Pty Ltd (1991) NSWLR 353, considered

COUNSEL: Mr M E Pope for the appellants
Mr A Lyons for the respondents

SOLICITORS: Hillhouse Burrough McKeown as town agents for Bruce Gillan for the appellants
Bennet & Philp as town agents for Vince Martin & Co for the respondents

HOLMES J: This is an appeal by leave already granted from a costs order made by Jones J after giving judgment for the plaintiff appellants in a civil trial. The plaintiffs had been successful in obtaining a declaration that the defendants were bound specifically to perform as purchasers under a contract for the sale of land. The plaintiffs had before trial made an offer in these terms: that the defendant specifically perform the contract for the sale of land, which was identified and was the subject of the action, and that the defendants pay the plaintiffs' costs of and incidental to the action on a standard basis.

On the basis that the judgment obtained was not less favourable than that offer, the plaintiffs sought the payment of costs on an indemnity basis, pursuant to rule 360 of the Uniform Civil Procedure Rules 1999. Rule 360 provides:

> (1) If -
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> (a) the plaintiff makes an offer to settle that is not accepted by the defendant and the plaintiff obtains a judgment no less favourable than the offer to settle; and
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> (b) the Court is satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer;

> the Court must order the defendant to pay the plaintiff's costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances.

Jones J followed a decision of Ambrose J in *Mitchell v Pacific Dawn Pty Ltd* [2003] QSC 179 in which the latter expressed his view that an offer to accept the whole of the relief sought in the claim, in effect requiring the complete capitulation of the other party, was not an offer to settle within the meaning of the rule, particularly where the nature of the relief claimed was such that the plaintiff would either succeed entirely or fail altogether.

Even if it were, Ambrose J said, it would in such circumstances be inappropriate to order indemnity costs. Jones J adopted that reasoning. He went on to note that in an application for specific performance, there was the prospect of dispute over the terms in which such an order would be made, so that it was necessary that those matters be aired during the hearing; as was the case in the proceedings before him.

Having concluded that the rule did not apply when the offer was for the entirety of the relief sought, he went on to say that in any event it was in all the circumstances appropriate that a different order from one awarding indemnity costs be made. Accordingly, he ordered the costs be assessed on the standard basis.

The plaintiffs appealed on the grounds that Jones J erred in the following respects: firstly, in holding that it was a requirement of rule 360 that the offer to settle had an element of compromise; secondly, in holding that the considerations which applied to orders for specific performance were such as to show that some other order was appropriate; and thirdly, in failing, when concluding that some other order was appropriate, to take into account the defendants' conduct so as to order indemnity costs.

The respondents, in supporting Jones J's construction of the rule, relied particularly on the decision of Ambrose J and on New South Wales authority in which it consistently has been held, for the purposes of the Supreme Court Rules 1970 (which refer, it should be said, to an offer of compromise) that an offer that the opponent pay the full amount of the claim or close to it is not an offer of compromise within the meaning of the rules.

In *Tickell v Trifleska Pty Ltd* (1991) 25 NSWLR 353, Rogers CJ explained the concept underlying the New South Wales rule in a way which has been accepted in that State ever since. The rule, he said, gave the plaintiff an inducement to make an offer which "reflected, not the best result that the plaintiff could hope to obtain if everything fell its way but, rather, a realistic assessment of what, in the circumstances, represented a fair and proper compromise". (at p.355).

He went on to say, "Unless circumstances are wholly exceptional a demand for payment to the plaintiff of everything, to which it may possibly be entitled, hardly falls in the category of the compromise." He pointed out that it was easier to accept that construction because if indemnity costs were otherwise justified, for example, where an unsuccessful party had prolonged the trial by deliberately false allegations of fact, the Court was able in any event to order indemnity costs.

In *Hobartville Stud v Union Insurance Co Ltd* (1991) 25 NSWLR 358, Giles J dealt with the argument that it was unfair for a plaintiff with a strong claim to have to abandon any part of the relief it sought. Giles J explained that the problem arose where in reality only liability was in issue. If the plaintiff were able to make an offer of compromise less than the acknowledged quantum, it could litigate liability entirely at the expense of the defendant, even if there were genuine questions as to liability. Compromise, he said, "connotes that a party gives something away". (at p.368). There are cases in a similar vein in the Federal sphere, where again the expression used in the relevant rule is "offer of compromise", but it is not necessary to set about a review of those.

The appellants contend that there is a crucial and significant difference between the use of the words "offer to settle" in the Queensland rules and "offer of compromise" in the New South Wales and Federal Court rules, but I do not think that the philosophy of the Queensland rules should be regarded as

significantly different, notwithstanding the use of the word "settle" rather than "compromise". The purpose of the rules, as rule 5(1) explicates, is to "facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense". That aim is hardly promoted by insistence on nothing less than all relief sought together with costs. A defendant can be taken to know when he receives the claim and statement of claim that it is open to him to consent to judgment in its terms. It does not advance resolution to repeat the same demand in the guise of an offer under the rule, and it is open to question whether what amounts to a demand for absolute satisfaction can correctly be characterised as an offer.

The argument which was put on behalf of the plaintiffs, that this disadvantages plaintiffs in an all or nothing case, such as this was said to be, is not compelling. It is always open to a plaintiff in that situation to offer some concession as to costs or, perhaps, in a specific performance case such as this to agree to accept something less than the contracted purchase price; and a plaintiff who faces an utterly spurious case is not obliged to make any offer. He may still seek indemnity costs in the exercise of the Court's discretion, entirely independent of rule 360. *Colgate Palmolive Co & Anor v Cussons Pty Ltd* (1993) 118 ALR 248 is a clear example of such a circumstance.

It is not necessary to embark on considerations of what degree of compromise is required before an offer is properly

described as an offer to settle. It suffices for present purposes to say that in my view Ambrose and Jones JJ were correct in their approach to rule 360. A proposal which demands nothing less than all the relief sought in the claim plus costs is not in truth an offer to settle. Jones J properly refused to make the order sought under rule 360. I would dismiss the appeal.

THE PRESIDENT: I agree.

JERRARD JA: I agree.

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THE PRESIDENT: The order is the appeal is dismissed with costs to be assessed.
