SUPREME COURT OF QUEENSLAND

CITATION:	*ACN 070 037 599 P/L & Anor v Larvik P/L & Anor [No 2]* [2008] QSC 118
PARTIES:	**ACN 070 037 599 PTY LTD** (first plaintiff) **SUSAN McEWEN** (second plaintiff) **v** **LARVIK PTY LTD (ACN 010 185 350)** (first defendant) **RONALD MALCOLM STAMFORD** (second defendant)
FILE NO:	BS4550 of 2004
DIVISION:	Trial Division
PROCEEDING:	Civil proceeding
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	6 June 2008
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions 2 June 2008
JUDGE:	Acting Justice Skoien
ORDER:	**1. There be judgment for the first plaintiff against the defendants in the amount of $315,890.82 for damages and interest calculated to 2 June 2008.** **2. The defendants pay the first plaintiff's costs of the proceeding, including reserved costs, to be assessed on the indemnity basis.** **3. By consent, there be judgment on the second plaintiff's claim for the defendants.** **4. The second plaintiff pay the defendants' costs of the proceeding incurred to 19 March 2008, including reserved costs limited to the issues relevant solely to her claim against the defendants to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – OTHER MATTERS – where first and second plaintiffs made a joint offer to settle – where second plaintiff abandoned her action before trial – where first plaintiff obtained judgment for a sum greater than contained in the offer – whether first plaintiff entitled to indemnity costs

under rule 360 *Uniform Civil Procedure Rules* 1999

PROCEDURE – COSTS – GENERAL RULE - COSTS FOLLOW THE EVENT – COSTS OF WHOLE ACTION – GENERALLY– where defendants entitled to costs order after second plaintiff abandoned her action before trial – whether costs included only that amount solely attributable to second plaintiffs claim

Trade Practices Act 1974 (Cth)
Uniform Civil Procedure Rules 1999, r 353(1), r 360, r 362

COUNSEL: Mr AS Mellick with him Ms SM McNeil for the plaintiffs
Mr GW Diehm with him Mr A Luchich for the defendants

SOLICITORS: Sykes Pearson Miller Solicitors for the plaintiffs
Macdonnells Law for the defendants

[1] **ACTING JUSTICE SKOIEN:** Further to my reasons which were delivered on 20 May 2008 the parties have delivered written submissions on the questions of election and costs.

Election

[2] The first plaintiff has elected judgment on the *Trade Practices Act* claim. The judgment sum has been agreed at $315,890.82 for damages and interest calculated to 2 June 2008.

[3] Had the election been for judgment in the breach of contract claim it is agreed that the sum would have been $93,402.42 for damages and interest calculated to 2 June 2008.

Costs – First Plaintiff

[4] The first plaintiff is entitled to a costs order against the defendants, including reserved costs. The question is whether the assessment should be on the standard basis or the indemnity basis.

[5] On 16 February 2006 the solicitors for the first and second plaintiffs served on the solicitors for the defendants an offer to settle in these terms:

> "The Plaintiffs offer to settle all of the claims made against the First and Second Defendants ("the Defendants") in the Court proceedings on the following terms-
>
> (a) that within thirty (30) days of acceptance of this offer the Defendants pay to the Plaintiffs the sum of $200,000.00;
>
> (b) the Defendants pay the Plaintiffs' costs on a standard basis of the proceedings on the District Court scale to be assessed if not agreed;

(c) on completion of the terms of settlement the Court proceedings be discontinued;

(d) this settlement to be in full and final satisfaction of all claims made by the Plaintiffs against the Defendants in the Court proceedings.

This offer to settle is made under Chapter 9, Part 5 of the *Uniform Civil Procedure Rule* 1999.

This offer to settle is open for acceptance until 8 March 2006."

[6] On 28 February 2006 the solicitors for the defendants communicated their clients' rejection of the offer.

[7] The offer to settle was made under rule 353(1) of the *UCPR* which reads:

"**353 If offer to settle available**

(1) A party to a proceeding may serve on another party to the proceeding an offer to settle 1 or more of the claims in the proceeding on the conditions specified in the offer to settle."

[8] Rule 360 reads:

"**360 Costs if offer to settle by plaintiff**

(1) If—

(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

(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 in appropriate in the circumstances."

[9] Rule 362 reads:

"**362 Interest after service of offer to settle**

(1) This rule applies if the court gives judgment for the plaintiff for the recovery of a debt or damages and—

(a) the judgment includes interest or damages in the nature of interest; or

(b) …

(2) For giving judgment for costs under rule 360 or 361, the court must disregard the interest or damages in the nature of interest relating to the period after the day of service of the offer to settle."

[10] The judgment of $315,890.82 includes interest of, I am told without contradiction, $49,176.75 between 16 February 2006 and 2 June 2008. So the critical figure of the judgment, is reduced to $266,714.07.

[11] The obvious reason for the rules cited above is to encourage the settlement of actions. That is possible if a plaintiff makes an offer of what he/she is prepared to accept in satisfaction of the claim so that the defendant can give mature

consideration to the prospects of the litigation, whether the plaintiff is likely to do better or worse than the offer. Rule 360 states the consequences of that decision.

[12] In this action the second plaintiff abandoned her action on the eve of trial so, as it happens, the first plaintiff is the sole recipient of a judgment.

[13] The offer to settle is expressed to be on behalf of both plaintiffs and simply specifies $200,000 for their claims plus costs on the standard basis. I see nothing wrong with the making of a joint offer. I note that r 353(1) specifically allows a plaintiff to offer to settle one or more of multiple claims which might be similar, overlapping or quite distinct.

[14] Had the defendants wanted to act upon the offer it would presumably have been necessary for them to decide what they were prepared to estimate for the claim of each plaintiff. How that figure was reached might vary from case to case, but it probably usually involves making an estimate of what, barring something extraordinary occurring, is the least which each plaintiff, if successful, should recover. Or it might be simply a commercial decision to pay a sum against the possibility of the plaintiffs doing better than the defendants hoped or expected. Had the defendants accepted the offer, it would have been completely up to the plaintiffs to divide the $200,000 they received in whatever proportions they considered desirable.

[15] Because the second plaintiff, before trial, abandoned her action it is agreed that there must be judgment for the defendants in that claim with costs. Only the basis of assessment of these costs remains to be decided. But I do not think the second plaintiff's abandonment calls for some sort of guesstimate, aided by hindsight, of the likely split between the two plaintiffs of the $200,000 which was offered. What it has done is simply to remove the second plaintiff from consideration entirely. It leaves the simple question to be asked "Has the remaining plaintiff had a result no less favourable than a judgment for $200,000?" The offer of $200,000 was put forward for both plaintiffs to settle. No division of that sum was put forward as between the two plaintiffs seeking individual settlements. The offer, in the plaintiff's minds, could have been on the premise of $199,000 for the first plaintiff, and $1 for the second plaintiff or any other combination, but I see nothing in the *UCPR* to require such a division. Had there been separate claims (r 353), there is nothing in that rule to say that the offer would have to specify a separate sum for each claim or any claim. It seems that a total figure would be permitted under the rule. Why should anything more detailed be required for a claim by two parties? I see no logical reason for an exercise which in many, if not most, cases represents a guesstimate or an insurance premium.

[16] If A and B jointly (not severally) offer to settle for $200,000, which is refused, and subsequently B withdraws, how can the offeree complain if A alone succeeds in a judgment of more that $200,000? I do not see that he can. The offeree could have settled both for $200,000, but chose not to. Ultimately A's action alone continued to judgment, for a greater sum than was offered to settle both his claim and B's claim,

which has disappeared. So I simply ask: Has the first plaintiff had a more favourable result than the offer of $200,000. In my view the first plaintiff has.

[17] I see no reason to work out some sort of adjustment of the first plaintiff's judgment sum (other than interest since the date of the offer) to take into account costs expended by the parties on the second plaintiff's action, due weight to which will be given in the award of costs in favour of the defendants against the second plaintiff.

Costs – defendants

[18] The defendants are entitled to a costs order against the second plaintiff. The argument is whether the order should be restricted to certain issues only and on what basis should they be assessed.

[19] Much of the second plaintiff's case duplicated the first plaintiff's case. It would clearly be unfair to order her to pay for work that the defendants had to do in any event on the first plaintiff's claims. I lack the necessary expertise to identify and quantify the costs attributable solely to the second plaintiff's separate action. Only a costs assessor can do that properly. So the order should be expressed to cover those costs which were incurred solely in relation to the claim of the second plaintiff.

[20] The defendants argue for indemnity costs against the second plaintiff. I fail to see any basis for that. She made no allegation of fraud. The breaches of the *Trade Practices Act* which she alleged were ultimately successfully prosecuted by the first plaintiff. She really only alleged a loss peculiar to her. There is no evidence of *mala fides* on her part or any other improper motive. She simply abandoned a claim she had made, for which she may have had any number of good reasons. For that she must bear an adverse order of costs, but on the standard basis.

Conclusion

[21] I order that:

1. There be judgment for the first plaintiff against the defendants in the amount of $315,890.82 for damages and interest calculated to 2 June 2008.

2. The defendants pay the first plaintiff's costs of the proceeding, including reserved costs, to be assessed on the indemnity basis.

3. By consent, there be judgment on the second plaintiff's claim for the defendants.

4. The second plaintiff pay the defendants' costs of the proceeding incurred to 19 March 2008, including reserved costs, limited to the issues relevant solely to her claim against the defendants to be assessed on the standard basis.