SUPREME COURT OF QUEENSLAND

CITATION:	*Paroz v Paroz & Ors* [2010] QSC 157
PARTIES:	**LESLIE PAROZ** (plaintiff) **v** **IAN PAROZ** (first defendant) **JENNIFER PAROZ** (second defendant) **LEWIS PAROZ** (third defendant) **KAREN PAROZ** (fourth defendant)
FILE NO/S:	9656 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	14 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	7 April 2010
JUDGE:	Peter Lyons J
ORDER:	**The plaintiff pay the defendants' costs of the action to be assessed on the standard basis until 3 July 2008, and thereafter the plaintiff pay the defendants' cost of the action to date, to be assessed on the indemnity basis.**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where the defendants alleged that the plaintiff made frequent and unnecessary amendments to pleadings – where the defendants alleged that the plaintiff's frequent changes of legal representatives resulted in delay – where the defendants alleged that the plaintiff made unsubstantiated allegations of fraud – where the defendants alleged that the plaintiff did not comply with court orders – where the defendant alleged that the plaintiff pleaded unsustainable causes of action – where the defendants alleged that some of the plaintiff's pleadings were plainly deficient – where the defendants alleged that the plaintiff failed to admit facts – where the defendants alleged that the plaintiff rejected offers to settle – whether it is appropriate to order the plaintiff to pay the defendants' costs on an indemnity basis *Todrell Pty Ltd v Finch & Ors; Croydon Capital Pty Ltd v*

Todrell Pty Ltd & Anor [2007] QSC 386, cited

COUNSEL: N H Ferrett for the plaintiff
A P Collins for the defendants

SOLICITORS: HopgoodGanim Lawyers for the plaintiff
Ernst & Young Law for the defendant

[1] For many years, the plaintiff and the defendants carried on a farming business, for most of the time pursuant to a written partnership agreement (*the Farming Partnership*) on land owned by the plaintiff and the two male defendants (who are the plaintiff's brothers), again, the land being held for most of the time under a written partnership agreement (*the Land Partnership*). As a consequence of a trial held in December 2009 and reasons delivered on 25 February 2010, I have determined a substantial part of the plaintiff's claim adversely to the plaintiff, though some issues, and some aspects of the plaintiff's claim, remain to be decided. The defendants seek an order that the plaintiff pay their costs to date on an indemnity basis. For the plaintiff, it is submitted that any order for costs should be made in the defendants' favour, on the standard basis.

The contentions

[2] In essence, the defendants contend that the plaintiff should be ordered to pay indemnity costs on a number of grounds, summarised (in an order slightly different from that in which they were presented on behalf of the defendants) as follows:

(a) frequent and unnecessary amendments to pleadings;
(b) frequent changes to the plaintiff's legal representation, and unnecessary delay;
(c) unsubstantiated allegations of fraud;
(d) non-compliance with court orders;
(e) pleading unsustainable causes of action, including those which must fail by reason of limitations issues, and plainly deficient pleadings;
(f) failure to admit facts and unreasonable denials;
(g) rejection of offers.

[3] The plaintiff contends that the matters advanced on behalf of the defendants, when properly considered, do not provide a sufficient basis for an order that he pay costs on an indemnity basis.

Principles relating to an order for indemnity costs

[4] Mr APJ Collins of Counsel, who appeared for the defendants, provided a summary of principles relating to an award of indemnity costs, by reference to *Colgate Palmolive Co v Cussons Pty Ltd;*[1] *John S Hayes & Associates Pty Ltd v Kimberly-Clark Australia Pty Ltd*;[2] *Cosgrove & Johns;*[3] and *Di Carlo v Dubois.*[4] Mr Ferrett of Counsel, who appeared for the plaintiff, did not take issue with that summary. From it, I have extracted the following:

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1 (1993) 118 ALR 248.
2 (1994) 52 FCR 201.
3 [2000] QCA 157.
4 [2002] QCA 225.

"(a) the ordinary rule is that costs are payable on a standard basis;

(b) the court ought not usually make an order for the payment of costs on some basis other than the standard basis unless the circumstances of the case warrant the court in departing from the usual course. The tests for such departure include 'as and when the justice of the case might so require' and 'some special or unusual feature in the case to justify the court in departing from the ordinary practice';

(c) the categories in which the discretion may be exercised are not closed;

(d) the question must always be whether the particular facts and circumstances of the case warrant the making of an order for the payment of costs other than on the standard basis. Circumstances which have been regarded as warranting the exercise of the discretion to award indemnity costs include:-

i. the making of allegations of fraud knowing them to be false, and the making of irrelevant allegations of fraud;
ii. evidence of particular misconduct that causes the loss of time to the court and the other parties;
iii. the fact that proceedings were commenced for some ulterior motive;
iv. the fact that proceedings were commenced in wilful disregard of known facts or clearly established law;
v. the making of allegations that ought never to have been made or the undue prolongation of a case by groundless contentions;
vi. an imprudent refusal of an offer to compromise; and
vii. an award of indemnity costs against as (sic) contemnor.

(e) Judges are not necessarily obliged to exercise their discretion to make an order for indemnity costs. Costs are always in the discretion of the trial judge, and provided that the discretion is exercised having regard to the applicable principles its exercise will not be found to have miscarried unless it appears that the order which has been made involves a manifest error of justice."

[5] He also referred to *Todrell Pty Ltd v Finch & Ors; Croydon Capital Pty Ltd v Todrell Pty Ltd & Anor* [2007] QSC 386,[5] where Chesterman J (as his Honour then was) identified a test which he had applied as being "whether there was something irresponsible about the conduct of the losing party which exposed its opponent to costs which should, in fairness, be ordered on the indemnity basis. It is, of course, irresponsible to commence proceedings which cannot succeed because of a known legal impediment."

Amendments to pleadings

[6] The plaintiff's claim and initial statement of claim were filed on 8 November 2004. At some stage this provoked objection or criticism on behalf of the defendants, but it was not until December 2006 that the matter was brought before the court. Muir J

5 [2007] QSC 386 at [4].

(as his Honour then was) ordered the plaintiff to provide further and better particulars of his statement of claim.

[7] The plaintiff then filed a substituted statement of claim on 9 May 2008; and he amended this document on 2 October 2008. On about 28 November 2008, Margaret Wilson J ordered that some paragraphs of this document be struck out, but gave the plaintiff leave to re-plead. An order was also made for the provision of further particulars. The plaintiff then filed a further amended pleading on 27 February 2009.

[8] On 20 October 2009, when the trial was to come on for hearing, Mr Ferrett, who had then recently been retained, sought an adjournment to re-draw the pleadings, which was granted. That resulted in the filing of a further substituted pleading on 23 October 2009.

[9] On behalf of the defendants it was pointed out that a number of the versions of the statement of claim required substantive responses, resulting in significant costs to the defendants.

[10] It was common ground that the amendments to the statement of claim were generally made under r 378 of the *Uniform Civil Procedure Rules* 1999 (*UCPR*); and that in each case the defendants were entitled to the costs to them resulting from the amendments, under r 386. It was expressly accepted on behalf of the defendants that the operation of r 386 should not now be varied.

[11] It is necessary at this point to pay some attention to the nature of the plaintiff's claim. By the time the proceedings had been instituted, the plaintiff had undertaken farming operations in partnership with some or all of the defendants, for a period of at least 24 years. It was not until 2003 that the plaintiff took any real objection to the conduct on which he ultimately based his claim. It is not surprising in those circumstances that the claim required reconsideration and refinement before it achieved a final form. As Mr Collins acknowledged at the hearing, the number of amendments made on behalf of the plaintiff is not uncommon. The course of amendments undertaken by the plaintiff ultimately refined and narrowed the issues for trial. Indeed, although to a significant extent many of the claims raised in earlier pleadings were likely to have been defeated by limitations defences, Mr Ferrett chose to subsume those parts which were not, into the claim finally advanced on the part of the plaintiff. Moreover, although the plaintiff was ultimately unsuccessful, there has been no suggestion that the claim finally advanced was vexatious, oppressive or not viable.

[12] I shall shortly come to the submission made on behalf of the defendants, based on the changes in the plaintiff's legal representation. It is by no means uncommon that when there is a change in legal representation, a case is looked at from a different point of view, resulting in amendments. I have mentioned the circumstances of the most recent amendments, and given some indication of the result. I also note there was a change in solicitors early in November 2006; and note that the pleadings were recast in August 2007, pursuant to the order of Muir J; and that there was another change in solicitors in July 2008, with amendments to the pleading in October 2008. To the extent that the changes in the plaintiff's legal representation has contributed to amendments to the pleadings, that does not seem to me to provide a proper basis for ordering indemnity costs.

[13] In my view, the mere fact that the plaintiff's statement of claim has been amended on a number of occasions is not itself sufficient to warrant an order for indemnity costs.

Changes of legal representation and delay

[14] The submissions made on behalf of the defendants state that on each occasion the plaintiff changed his solicitors, delay resulted from the fact the new solicitors "often had to negotiate the release of the plaintiff's file from his former solicitors and also had to review the plaintiff's file to be sufficiently appraised of the matters handling the proceeding". It is likely that both of those statements are true. However, it was expressly accepted on behalf of the defendants that the plaintiff was entitled to change his legal representation in the course of the hearing.

[15] It was also pointed out that there was an extended period of some months where the plaintiff was not legally represented.

[16] Reference was also made to the fact that there were directions hearings or mentions on some 13 occasions in a period of approximately 18 months.

[17] The plaintiff was represented by five different solicitors from September 2003 until now. The circumstances of those changes in legal representation were not investigated in the present hearing. Leaving aside the issue of delay, and the possible effect of these changes on the course of amendments of the plaintiff's pleading (already discussed), the material does not demonstrate that the conduct of the plaintiff was sufficiently unreasonable, or otherwise irresponsible, so as to justify an order for indemnity costs against him, or that it otherwise provides a ground for such an order.

[18] So far as delay is concerned, it should be noted that a period of two years passed after the initial statement of claim, before challenges to it were brought before the court by the defendants. They did not exhibit any particular concern at that time to advance the case quickly. They explain the delay which occurred over that period by reference to the fact that negotiations were under way between the parties. That does not seem to have ceased after December 2006. The defendants made an offer of settlement on 19 June 2008. The defendants' submissions refer to the fact that three mediations were conducted in relation to this dispute (without reference to the dates). I do not consider, viewed in the context of the litigation as a whole, that any delays which occurred as a result of the plaintiff's changing of his legal representation are such as to justify an order for indemnity costs.

[19] With respect to the directions hearings and mentions, these seem to have been advanced on behalf of the defendants as demonstrative of the delay. However the circumstances in which these hearings occurred were not explored in the current proceedings. To the extent that any of those hearings, and any related delay, might be the consequence of conduct for which any of the parties could be criticised, it seems to me likely to be reflected, at least to some extent, in costs orders made at the time. If there was some particular conduct of the plaintiff which the defendants wished to contend was not appropriately recognised in such a costs order, it seems to me that the appropriate course was for the defendants, in the current proceedings, to identify that conduct, so that the plaintiff might have responded to any criticism made of him. That has not occurred. It seems to me that a mere general reference

to a high number of directions hearings and mentions does not provide a proper basis for making an award of indemnity costs against one of the parties.

[20] In my view, matters raised on behalf of the defendants in relation to the plaintiff's changes to his legal representation, delay, and directions hearings and mentions, do not provide a basis for making an order for indemnity costs against the plaintiff.

Allegation of fraud

[21] In a version of the statement of claim filed on 9 May 2008, the plaintiff made the following allegation in respect of the second defendant:

> "The Second Defendant was taking money out of the Plaintiff's personal bank account at times without the knowledge or consent of the Plaintiff and using these moneys to balance the books of the 'LR&LM Paroz' partnership and would later return some of the money."

[22] The allegation was not repeated in the statement of claim filed on 23 October 2009, though it was retained in intervening versions of this pleading.

[23] On behalf of the defendants it was submitted that the allegation was "utterly without foundation"; and it was pointed out that it was not the subject of any allegation or suggestion at the trial before me.

[24] The submission seems by inference to draw upon some of the circumstances for making an order for indemnity costs previously mentioned, namely the making of allegations of fraud knowing them to be false, or the making of irrelevant allegations of fraud. It may also be related to the principle formulated by Chesterman J.

[25] As Mr Ferrett pointed out, the allegation was pleaded in support of a claim that an account was required. In that context, it was not irrelevant. Since the claim for an account was not pursued in the hearing before me, the fact that the allegation was not ventilated at the hearing is not particularly surprising. The evidence does not demonstrate that the allegation was known by the plaintiff to be false.

[26] It is debatable whether the allegation amounts to an allegation of fraud. Such allegations are required both by the *UCPR*,[6] and under the general law,[7] to be specifically pleaded. There is no express allegation of fraud or dishonesty. It is implicit in the allegation, and consistent with the general tenor of the evidence relating to the relationship between the parties, that the second defendant had control of the plaintiff's bank account, with the authority of the plaintiff. It should be noted that the allegation is that money was transferred to a partnership of which the plaintiff was one of the partners. The allegation includes an assertion that at times money was then transferred back to him. The allegation suggests that there are documentary records of all of the transactions. As mentioned, the allegation is made in support of a claim for an account. In the context of the pleading, and the case as a whole, the allegation that these events occurred without his knowledge or consent does not seem to me to be in truth an allegation of fraud.

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6 See r 150 of the *UCPR*.

7 See *Davy v Garrett* (1877) 7 Ch D 473, 489 and *Whittle v Whittle* [1964] NSWR 1031, 1033.

[27] While this allegation may have caused distress to the second defendant, I do not consider that it provides a proper basis for making an award of indemnity costs against the plaintiff, whether in favour of the second defendant, or of all of the defendants (which seems to be the basis on which it has been advanced).

Non-compliance with court orders

[28] On 20 October 2009, when the scheduled hearing was adjourned, directions were made for the further conduct of proceedings. One was a direction fixing the time by which the plaintiff was to file and serve a reply, and file an expert's report. On 19 November 2009, some 13 days before the commencement of the hearing before me in December 2009, the defendants brought an application, apprehending that the plaintiff would not meet the time limits. The reply was in fact delivered on 23 November 2009, and the expert's report was delivered at about this time. The trial proceeded as scheduled. As was pointed out on behalf of the plaintiff, the application on 19 November 2009 was premature. It should be noted that it was not then known whether the plaintiff's conduct would in fact prejudice the trial date.

[29] On 7 July 2009, Margaret Wilson J ordered that inspection of documents be carried out by 31 July 2009. The plaintiff did not inspect the documents within that time. It should also be noted that the plaintiff represented himself between April and 28 July 2009. It is likely that in the period leading up to 31 July 2009, the plaintiff was actively seeking out and engaging solicitors to represent him for the trial, then scheduled to take place in October.

[30] No prejudice to the defendants from the plaintiff's failure to carry out an inspection of documents by 31 July 2009 has been identified in the submissions made on their behalf. It was pointed out, on behalf of the plaintiff, that his failure to do so was prejudicial to him.

[31] In these circumstances, it seems to me that the defendants have not, by reference to non-compliance with court orders, established a basis on which an order should be made for indemnity costs against the plaintiff.

The plaintiff's pleadings

[32] In essence, the defendants submit that an order for indemnity costs should be made because earlier pleadings on behalf of the plaintiff included claims that were statute barred, and some lacked particularity or were otherwise technically deficient.

[33] It is not entirely accurate to say that all of the plaintiff's claims, save for that in his final statement of claim, were statute barred. To the extent that claims were made for breaches of obligation after 8 November 1988, the submission is not correct. However, substantial parts of the plaintiff's earlier claims were statute barred.

[34] There were obvious difficulties in characterising the plaintiff's claim appropriately, and in a way which was not substantially defeated by a limitations defence. Those difficulties are reflected in the amendments to the plaintiff's pleadings. However, a viable cause of action relying on the same factual matrix was ultimately identified. As has been previously mentioned, the defendants are entitled to costs resulting from the amendments. I do not think that the further sanction of an order for costs on an indemnity basis is warranted on this basis.

[35] The principal point advanced on behalf of the defendants in relation to the plaintiff's pleadings related to the limitations issue. It was also submitted that the plaintiff's original statement of claim was completely lacking in particularity. However, the defendants took no action in relation to this pleading for about two years. No doubt its defects were relied upon in support of an application for costs. A later pleading is criticised for pleading material facts as particulars, and because it failed to disclose a cause of action, or claim proper relief. These matters were drawn to the attention of the plaintiff's legal advisers, and the pleading was later amended, with costs consequences which have been referred to. These matters do not seem to me to warrant an order for costs on an indemnity basis.

Failure to admit facts

[36] The defendants delivered a notice to admit facts on 2 October 2007, and an informal request to admit facts was made by letter dated 19 November 2009. The first document related to the use by the plaintiff of partnership property for his own purposes. The second related to the extent to which the plaintiff's fuel costs were subsidised.

[37] The admissions sought by the first document seem primarily directed to the taking of accounts, a matter not dealt with in the hearing before me. It was acknowledge at the commencement of that hearing that the plaintiff had made some personal use of partnership property. It does not seem to me that any particular order for indemnity costs should be made by reference to the plaintiff's failure to make the admissions sought by this document.

[38] It is difficult to say that the failure by the plaintiff to make the admissions relating to the fact that his fuel expenses were subsidised had any material bearing on the costs incurred by the defendants. Instructions were obviously taken from the defendants prior to the letter seeking the admissions. Questions related to this topic occupied only a very small proportion of the time taken in the hearing. It seems to me that this does not provide any real ground for making an order for indemnity costs against the plaintiff.

Rejection of offers to settle

[39] A number of offers to settle the proceedings were made by the defendants, and some were made by the plaintiff. None was accepted. It was submitted on behalf of the defendants that the plaintiff unreasonably refused to accept offers made to him; and that accordingly an order for indemnity costs should be made on this basis.

[40] It is sufficient to refer to the offers made on behalf of the defendants. It should be noted that the offers were offers to settle the whole of the plaintiff's claim; whereas the hearing which has been conducted deals only with a part of it. However, a consequence of that hearing is that the plaintiff will not receive more than his interest as a partner in the two partnerships; and accordingly will not receive more than one-third of the net assets of the partnerships. The effect of the submissions made on behalf of the defendants was that on the conclusion of the proceeding, and as a result of the determination of that part of them in respect of which there has already been a hearing, the plaintiff will not receive more than one-third of the net assets of the partnerships, and that accordingly the reasonableness of the offers

made to him should be tested by reference to that. That position was not challenged by the plaintiff.

[41] It should also be noted that the offers were either made on an open basis, or in the form of *Calderbank* offers.[8]

[42] The first offer was made in a letter of 16 December 2003. It was based upon views about the values of the farming properties held by some of the parties at that time. Pursuant to this offer, the plaintiff would have received a little in excess of one-third of the net value of the assets of the partnerships, based on those views. Part of the mechanism by which that was to be achieved was the transfer to the plaintiff alone of two of the farming properties, Hattonvale and Hiddenvale. In the details of the proposal, the value ascribed to Hattonvale was $500,000; and the value ascribed to Hiddenvale was $375,000.

[43] At a relatively early stage, it is apparent that the plaintiff held a view that Hattonvale was worth significantly more than this amount. It sold, some years later, for more than $4m. Hiddenvale was also sold (again some years later) for $1m.

[44] It seems to me that this offer was made by the defendants with a view to giving some recognition to the plaintiff's position, regardless of strict legal rights. Acceptance of it would have resulted in the plaintiff receiving more than one-third of the net assets of the partnership.

[45] It appeared to be common ground that the real question is whether the defendant unreasonably rejected the offer, so as to justify the making of an order for indemnity costs.

[46] It should be noted that the offer was open for acceptance within 14 days[9]. It seems to me likely that at that time, considerable uncertainty would have existed about the strength of the plaintiff's claim. The offer was made at an early stage of the dispute, before litigation had been commenced, and approximately three months after solicitors had first been engaged on behalf of the plaintiff. I have already noted some of the complexities associated with the plaintiff's claim.

[47] In that state of uncertainty, it does not seem to me to have been unreasonable for the plaintiff not to have accepted the offer.

[48] A consequence of the plaintiff's rejection of the offer is that the defendants are substantially better off than they would have been if the plaintiff had accepted the offer. It was accepted on behalf of the defendants that an indemnity costs order was intended to be compensatory, rather than punitive. In view of the very significant benefits that have come to the defendants by reason of the rejection of this offer, it seems a little difficult to attribute significant weight to the appropriateness of awarding full compensation for costs incurred in the present case.

[49] Taking these two matters into consideration, it seems to me that the plaintiff's rejection of this offer does not warrant visiting an order for indemnity costs on him.

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8 See *Calderbank v Calderbank* [1976] Fam 93 at 103-104.

9 That is apparent both from the letter making the offer, and the letter from the defendants' solicitors of 22 April 2004.

[50] I am conscious that the result of accepting this offer, as things have turned out, would have been much more favourable to the plaintiff than the likely outcome is now. His share of the net assets of the partnership may well have been of the order of two-thirds. It may have been the case that the plaintiff would have felt somewhat uncomfortable accepting an offer which he suspected substantially undervalued Hattonvale. As there was no direct evidence about this, I do not rely on that consideration in reaching a conclusion about this offer. I am, however, conscious that it is likely that at this stage, there would have been some uncertainty about the true values of all of the properties. Given the limited time for which this offer was open for acceptance, this provides an additional reason for holding that the plaintiff's failure to accept it was not unreasonable, and accordingly does not warrant an order for indemnity costs.

[51] The next offer was made on 22 April 2004. It provided for the transfer of some properties, together with cattle and plant, to the plaintiff; the transfer of Mutdapilly together with cattle and plant to Lewis Paroz, and the sale of some properties (Hattonvale and Hiddenvale) and cattle. It assumed sale prices and values. The value assigned to Mutdapilly was adjusted, by the exclusion of the value of the house constructed on it. The amounts calculated in the offer were to be adjusted, in a manner unspecified, when properties were sold. There was obvious uncertainty about the values of the properties being transferred to the plaintiff and to Lewis; and about the value ascribed to the house on Mutdapilly.

[52] In my view, it was not unreasonable in those circumstances for the plaintiff not to accept this offer.

[53] The next offer is set out in a letter from the defendants' solicitors dated 29 July 2004. It had some similarities with the previous offer, though Hiddenvale was also to be transferred to the plaintiff. It was expressly made dependant on the sale of Hattonvale at $2,500,000. No provision was made for the consequences of the sale of Hattonvale at some other figure. Also, an assessment of the position that would have been achieved by this offer is dependant upon valuations of a number of properties at the time the offer was made; and it appears again to ascribe a value to the house at Mutdapilly, without evidence as to its value.

[54] Again, in my opinion, it was not unreasonable for the plaintiff to reject this offer.

[55] Further offers were made after the commencement of litigation on 8 November 2004. The first was contained in a letter of 9 May 2005. It was open for a period of 14 days. While the calculations reflect a premium of $200,000 in favour of the plaintiff, it was conditional on the sale of Hattonvale for $2,500,000; and in the event of any shortfall, that was to come from the plaintiff's share of the assets. No provision was made for the sale of Hattonvale at a higher amount. Again, the offer seems to have been based on a value ascribed to the house at Mutdapilly, which was excluded from the calculations. It also recognised the right of Mrs Olive Paroz, the mother of the plaintiff and the male defendants, to reside for life on one of the properties to be transferred to the plaintiff. For reasons similar to those given for previous offers, I do not think it was unreasonable for the plaintiff not to accept this offer.

[56] Another offer was made on 19 October 2006. It proposed the transfer of a number of properties to the plaintiff and his mother, together with some plant and stock. In

addition, the plaintiff was to receive $200,000. Lewis Paroz was to receive Mutdapilly, together with plant and stock; and Ian Paroz was to receive the Klibbie's property. Hattonvale was to be sold. The offer did not identify how the proceeds were to be distributed. A letter of 30 October 2006 stated that the proceeds were to result in a "cash adjustment to correct inequalities of distributed assets based on the valuations"; and that after this adjustment, and payment of partnership debts, capital gains tax and costs of sales on transfers, one-third would be received by each of the Paroz bothers. The difficulties with this offer are similar to those with a number of the previous offers, reflected in the uncertainty of the cash adjustment. Again, I do not consider it unreasonable for the plaintiff not to have accepted that offer.

[57] On 19 June 2008, a further offer was made by the defendants. Initially, it was submitted on their behalf that this was a formal offer of settlement made under Ch 9, Pt 5 of the *UCPR.* However, that submission was not maintained. It provided for the assets of the partnership to be divided into one-third shares; with the plaintiff to receive one share; the first and second defendants to receive a one-third share; and the third and fourth defendants to receive a one-third share. However, from each share, the sum of $100,000 was to be held on trust for Mrs Olive Paroz for her life, with any money thereafter to be divided into one-third shares, and distributed to the three groups.

[58] On behalf of the plaintiff, it was conceded that this offer could be compared with the result achieved, or to be achieved, from the litigation. However, it was submitted on his behalf that his contribution towards the trust for his mother meant that acceptance of this offer would place him in a worse position, unless it were established that the costs recoverable by the defendants on a standard basis at that point exceeded $100,000.

[59] It seems to me that this is not the correct comparison. Had the plaintiff accepted that offer, he would have received one-third of the net assets of the partnership, subject to his contribution of $100,000 to the trust for his mother. As a result of rejecting the offer, he will receive one-third of the net assets; less (at least) the costs of the defendants of the action to date, assessed on the standard basis; and subject to his obligation to account for his use of partnership property. The extent of that use has not yet been fully identified, but the plaintiff was using the farms to support his own cattle from about March 2007. I do not have evidence which enables the calculations of these amounts, but they are likely to be substantial, and may possibly exceed $100,000.

[60] On the plaintiff's approach it seems unlikely that the costs incurred on behalf of the defendants up to the date of the offer assessed on the standard basis, would approach $100,000. However, the cost by that time would not have been insignificant.

[61] The history of the dispute rather strongly suggests that throughout, the plaintiff has been active in protecting and promoting his mother's interests. Of the three sons, he was the one most overtly concerned to ensure provision for his mother. It is apparent from the offer made on behalf of the defendants by letter dated 9 May 2005 that the plaintiff had raised concerns about provision for her. While the offer of 19 June 2008 provided for a contribution by the plaintiff of $100,000 to a trust for his mother, it required similar contribution from the other respondents. It seems

to me that, from the plaintiff's point of view, this element of the offer can be seen as securing significant contributions from his brothers and their wives to the maintenance of his mother, while requiring him to commit a specific amount to an obligation of which he was particularly conscious.

[62] Viewed in that way, it seems to me that it was unreasonable of the plaintiff to continue the litigation. That view is reinforced by reason of the fact that acceptance of the offer would have exonerated him from any obligation to pay costs, and made no provision for the taking of accounts, or otherwise requiring that the plaintiff make allowance for his personal use of partnership property. In my view, the plaintiff's failure to accept this offer was unreasonable, and was an imprudent refusal of an offer to compromise. It warrants an order that the plaintiff pay the costs of the defendants, to be assessed on an indemnity basis, from 3 July 2008 (the date on which the offer lapsed).

Conclusion

[63] In my view, it is appropriate to order that the plaintiff pay the defendants' costs of the action to be assessed on the standard basis until 3 July 2008, and thereafter that the plaintiff pay the defendants' cost of the action to date, to be assessed on the indemnity basis.