SUPREME COURT OF QUEENSLAND

CITATION:	*Blundstone v Johnson & Anor* [2010] QCA 258
PARTIES:	**WARWICK CHARLES BLUNDSTONE** (applicant/respondent) **v** **WAYNE PHILLIP JOHNSON** (first respondent/first applicant) **ALLIANZ AUSTRALIA INSURANCE LTD** ACN 000 122 850 (second respondent/second applicant)
FILE NO/S:	Appeal No 14429 of 2009 DC No 2365 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil) – Further Orders
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	24 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Holmes and Chesterman JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The applicants are to pay the respondent's costs of the application for leave to appeal on the standard basis.** **2. The respondent is to pay the applicants' costs of the application for indemnity costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where applicants sought leave to appeal a decision extending a limitation period under the *Motor Accident Insurance Act* 1994 (Qld) – where application for leave to appeal dismissed – where respondent applied for costs to be assessed on an indemnity basis – where respondent had made a *Calderbank* offer – where respondent's application for indemnity costs based on arguments that the primary judgment was unremarkable and unanimously supported by the Court of Appeal; that the applicants failed to establish any different legal principle; that the applicants abandoned their primary appeal point; that the respondent's claim was a modest one; that the applicants' liability was accepted and only quantum was in issue; that there was no prejudice

occasioned to the applicants by the respondent's delay; and that the applicants were attempting to transfer their liability to professional indemnity insurer for the respondent's solicitor – where respondent argued that the making of a *Calderbank* offer would not, of itself, justify an order for indemnity costs; that their application for leave was not wholly unmeritorious; that the application was not made for ulterior motives; and that the application was based on Court of Appeal authorities, which the Court distinguished – whether costs should be ordered on the standard or indemnity basis

Motor Accident Insurance Act 1994 (Qld), s 3(c), s 57(2)(b)

Colgate-Palmolive Co v Cussons Pty Ltd (1993) 46 FCR 225; [1993] FCA 536, cited
Spencer v Nominal Defendant [2008] 2 Qd R 64; [2007] QCA 254, cited
Tector v FAI General Insurance Co Ltd [2001] 2 Qd R 463; [2000] QCA 426, cited

COUNSEL: D B Fraser QC for the applicants
W Campbell for the respondent

SOLICITORS: McInnes Wilson Lawyers for the applicants
KM Splatt & Associates for the respondent

[1] **HOLMES JA:** On 15 June 2010, this court dismissed the applicants' application for leave to appeal against a District Court judgment further extending a limitation period under s 57(2)(b) of the *Motor Accident Insurance Act* 1994 (Qld). The respondent now seeks his costs of that application on an indemnity basis, on the strength of *Calderbank* offers and what he says is the poverty of the applicants' arguments on appeal.

[2] The history of the respondent's offers to settle is as follows. On 17 December 2009, his solicitors wrote to the applicants' solicitors, advising that they considered them to have poor prospects of success on their foreshadowed appeal, and would seek the respondent's costs on the indemnity basis if it failed. On the other hand, the respondent was prepared to forego the costs he had incurred in briefing counsel if the appeal did not proceed. Undeterred, the applicants' solicitors served a notice of appeal a few days later. On 5 February 2010, the respondent's solicitors wrote again, reiterating their view of the appeal's poor prospects, making what was expressed to be a *Calderbank* offer, that if the appeal were withdrawn within seven days no costs would be sought, and warning again that if it proceeded and failed, costs would be sought on the indemnity basis. The respondent's solicitor deposes to the respondent's willingness and ability to carry out the offer.

[3] As well as relying on those offers, the respondent contends that the primary judge's reasons for extending the limitation period were unremarkable and met with the unanimous approval of this court; that the applicants failed to establish any different legal principle from those applied; and that the applicants had abandoned their principal argument, as to the effect of an earlier consent order for extension of the limitation period. The respondent's claim was a modest one; the applicants had admitted liability; and there was no prejudice occasioned to the applicants by the

respondent's delay. The applicants were merely attempting to transfer their admitted liability to the professional indemnity insurer for the respondent's solicitors. The application for leave to appeal was unreasonably instituted and unreasonably maintained, in light of the offers made.

[4] The applicants argued that the making of an offer of compromise would not, of itself, justify an order for indemnity costs. Their arguments on the leave application had not been wholly unmeritorious, nor were they made for an ulterior purpose; they were based on authorities of this court which, as it happened, were distinguished in the reasons for judgment. The respondent had not put on any material to show that his solicitor/client costs would exceed costs on a standard basis.

[5] The applicants are right in contending that the refusal of a *Calderbank*-type offer of compromise would not inevitably result in an order for indemnity costs. Such orders require some unusual feature to justify them; for example, that the "conduct of the party against whom the order is sought is plainly unreasonable"[1] or falls within one of the particular categories of misconduct identified by Sheppard J in *Colgate-Palmolive Co v Cussons Pty Ltd*. [2]

[6] It is not really correct to say that the applicants in this case abandoned their principal argument during the appeal. Their argument at all times turned on the applicability of this court's decision in *Spencer v Nominal Defendant*[3] to the facts of the present case, although their contentions as to the effect of the decision and of the terms of the contract supposedly embodied by the consent order did have a certain fluidity about them. There is some force in the respondent's submission that the applicants' conduct in seeking to appeal smacked of the opportunistic, in circumstances where the delay which had occasioned the need for the District Court judge's order was brief (one week) and caused no prejudice. The second applicant, of course, was a statutory insurer, and one might question whether its conduct was in conformity with the objects of the *Motor Accident Insurance Act*, one of which is "to encourage the speedy resolution of personal injury claims resulting from motor vehicle accidents".[4]

[7] But it cannot be said that the applicants' arguments were entirely without merit, although they were not, in the event, accepted. The case does not possess the unusual feature or features which would justify the court from departing from the usual order for costs. The applicants should pay the respondent's costs of the application for leave to appeal on the standard basis. The respondent should pay the applicants' costs of this application.

[8] **CHESTERMAN JA**: My impression of this matter was that the applicant's conduct in bringing and prosecuting its application for leave to appeal was unreasonable to the extent justifying an award of indemnity costs against him. Holmes JA and Atkinson J think the unreasonableness of the conduct is insufficient to form a basis for such an order. The conduct in question is close to the borderline and I defer to my colleagues' opinion. I therefore agree with the order for costs proposed by Holmes JA.

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1 *Tector v FAI General Insurance Co Ltd* [2001] 2 Qd R 463 at 464.
2 (1993) 46 FCR 225 at 233-234.
3 [2008] 2 Qd R 64.
4 Section 3(c).

[9] **ATKINSON J:** I agree with the orders proposed by Holmes JA and with her Honour's reasons.