SUPREME COURT OF QUEENSLAND

CITATION:	*St Clair v Timtalla Pty Ltd & Anor (No 2)* [2010] QSC 480
PARTIES:	**ARCHIE STEPHEN ST CLAIR** (plaintiff) **v** **TIMTALLA PTY LTD** (first defendant) AND **AVAID PTY LTD (UNDER EXTERNAL ADMINISTRATION)** (second defendant) AND **MALEBA OPERATIONS PTY LTD** (third defendant) AND **AVSERVE PTY LTD (UNDER EXTERNAL ADMINISTRATION)** (fourth defendant) AND **AIRCRAFT TECHNICIANS OF AUSTRALIA PTY LTD** (fifth defendant)
FILE NO/S:	BS5637 of 1996
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	31 August 2010 (final submissions)
JUDGE:	Martin J
ORDER:	**1. THE FIFTH DEFENDANT PAY THE PLAINTIFF'S COSTS OF AND INCIDENTAL TO THIS ACTION ON AN INDEMNITY BASIS FROM THE DATE OF THE PLAINTIFF'S OFFER AND ON THE STANDARD BASIS FOR THE BALANCE.**

2. THE FIFTH DEFENDANT PAY THE FIRST DEFENDANT'S COSTS OF AND INCIDENTAL TO THIS ACTION ON THE STANDARD BASIS.

CATCHWORDS: PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where the plaintiff made an offer of settlement to the first and fifth defendants – where the offer was not accepted – where the Court awarded damages against the fifth defendant no less favourable than the offer of settlement – whether the fifth defendant should pay indemnity costs

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – OTHER CASES – where the plaintiff was successful at trial against the fifth defendant but not the first defendant – whether the fifth defendant ought to pay the first defendant's costs – whether a Sanderson order should be made

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PARTIES – OTHER MATTERS – where the second, third and fourth defendants were served but did not ever enter an appearance – where the second, third and fourth defendants never filed Notices of Intention to Defend – whether the words "defendant" and "defendants" in Ch 9, Pt 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) should be construed as meaning a defendant who has appeared and not someone who has merely been named and served

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PARTIES – PLEADING – STATEMENT OF CLAIM – words and phrases – "and/or" – whether the Statement of Claim alleged the defendants to be jointly or jointly and severally liable – whether an offer to settle was made to all defendants

Uniform Civil Procedure Rules 1999 (Qld), r 135, r 360, r 361, r 363

Besterman v British Motor Cab Co Ltd [1914] 3 KB 181
Bonitto v Fuerst Bros & Co Ltd [1944] AC 75
Bullock v London General Omnibus Company [1907] 1 KB 264
Calderbank v Calderbank [1975] 3 All ER 333
Castro v Hillery [2003] 1 Qd R 651
Commonwealth v Gretton [2008] NSWCA 117
Employers Mutual Liability Insurance Co of Wisconsin v Tollefsen 263 NW 376
Fennell v Supervision and Engineering Services Holding Pty

Ltd (1988) 47 SASR 6
Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) (2005) 13 VR 435
Johnson's Tyne Foundry Pty Ltd v Maffra Corporation (1948) 77 CLR 544
Lackersteen v Jones (No 2) (1988) 93 FLR 442
McChesney v Singh & Ors [2004] QCA 217
Morgan v Johnson (1998) 44 NSWLR 578
Re Moage Limited (1998) 153 ALR 711
Sanderson v Blyth Theatre Co [1903] 2 KB 533
St Clair v Timtalla Pty Ltd & Anor [2010] QSC 296

COUNSEL: J A Griffin QC and G M Egan for the applicant
P Axelrod for the respondents

SOLICITORS: Cleary & Lee for the applicant
CLS Lawyers for the respondents

[1] In giving judgment in this matter, I dismissed the claim against the first defendant (Timtalla) and gave judgment against the fifth defendant (ATA) for $1,729,566. The parties sought, and were granted, leave to provide written submissions dealing with the question of costs.

[2] Mr St Clair seeks:

(a) an order for indemnity costs against ATA; and
(b) an order that ATA pay the costs of Timtalla on the standard basis.

[3] ATA submits that it should only have to pay costs on the standard basis and that Mr St Clair should pay Timtalla's costs.

[4] Timtalla did not make a written submission.

The claim for indemnity costs

[5] The plaintiff made an offer to settle the action in April 2000. So far as is relevant, it was in these terms:

> "Take notice that the plaintiff, Archie Stephen St Clair, pursuant to rule 353 of the *Uniform Civil Procedure Rules* 1999 offers to settle the plaintiff's claim in this action on the following terms and conditions:-
> 1. The First and Fifth Defendants will pay to the plaintiff the sum of five hundred thousand dollars ($500,000) in satisfaction of the plaintiff's cause of action for general damages, special damages and interest.
> 2. The said sum of five hundred thousand dollars ($500,000) is inclusive of any refund that may be due to
> 2.1 The Department of Social Security pursuant to the provisions of the *Social Security Act* 1947, As Amended;
> 2.2 The Commonwealth Rehabilitation Service;

2.3 All moneys due and owing to the Health Insurance commission pursuant to section 24 of the Health and Other Services (Compensation) Act of 1995.

3. The First and Fifth defendants will, in addition to the sum of five hundred thousand [sic] ($500,000) pay the plaintiff's party and party professional fees and disbursements on the Supreme Court scale to the date hereof together with the necessary costs of acceptance only to be taxed.

4. This offer remains open for acceptance for a period of 14 days from the service of this notice, shall then lapse [sic]."

[6] Rule 360 of the *Uniform Civil Procedure Rules* 1999 (Qld) provides for the consequences of an offer:

> "**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 is appropriate in the circumstances.
>
> (2) If the plaintiff makes more than 1 offer satisfying subrule (1), the first of those offers is taken to be the only offer for this rule."

[7] The fifth defendant submits that the offer was not in accordance with r 363. That rule provides:

> "**363 Multiple defendants**
>
> (1) If there are 2 or more defendants, the plaintiff may make an offer to settle with any defendant, and any defendant may offer to settle with the plaintiff.
>
> (2) However, if defendants are alleged to be jointly or jointly and severally liable to the plaintiff and rights of contribution or indemnity may exist between the defendants, this rule applies to the offer to settle only if—
>
> (a) for an offer made by the plaintiff—the offer is made to all of the defendants and is an offer to settle the claim against all the defendants; or
>
> (b) for an offer made to the plaintiff—
>
> (i) the offer is an offer to settle the plaintiff's claim against all the defendants; and

> (ii) if the offer is made by 2 or more defendants, by the conditions of the offer the defendants who make the offer are jointly or jointly and severally liable to the plaintiff for the whole of the amount of the offer."

[8] The fifth defendant argues that r 363(2) applies and, because the offer was not made to the second, third or fourth defendants, the offer cannot properly be considered as being one made under Chapter 9 Part 5 of the UCPR.

[9] Mr St Clair submitted that there are two reasons to reject that argument:

(a) The relevant statement of claim did not allege that the second, third and further defendants were liable jointly, or jointly and severally, with other defendants; and
(b) The word "defendant" in Chapter 9 Part 5 of the UCPR should only be taken to refer to a defendant who has appeared.

[10] The relevant part of the statement of claim read:

> "6. In the foregoing premises, the first defendant and/or second defendant and/or third defendant and/or fourth defendant and/or fifth defendant owed to the plaintiff a duty of care. …
>
> …
>
> 11. In the foregoing premises, the second defendant and/or third defendant and/or fourth defendant and/or fifth defendant owed to the plaintiff a duty of care …
>
> ...
>
> 14. The said helicopter crash was caused as a result of the negligence and/or breach of duty of care of the first defendant and/or the second defendant and/or third defendant and/or fourth defendant and/or fifth defendant ..."

[11] The pleading is replete with the device "and/or" which was accurately described by Viscount Simon LC in *Bonitto v Fuerst Bros & Co Ltd* [1944] AC 75 at 82 as the "Bastard conjunction" which was the "commercial courts contribution to basic English". The term has generally been regarded as unacceptable in commercial documents and more so in pleadings. In *Re Moage Limited* (1998) 153 ALR 711, Burchett J said (at 716-717):

> "Although Lord Reid declared in *John G. Stein & Co Ltd v O'Hanlon* [1965] AC 890 at 904 that '[t]he symbol "and/or" is not yet part of the English language', it has long been recognized as a loose expression conveying a vague meaning. An early version of it is to be found in *Cuthbert v Cumming* (1855) 24 LJ Ex 198, where Alderson B said (at 199) 'the contract on the face of the charter-party was, that the parties were to "load a full and complete cargo of sugar, molasses, and/or other lawful produce," so that, according to the contract, the parties were either to load a full and complete cargo of sugar and molasses, and other lawful produce, or a full cargo of sugar and molasses, or a full cargo of other lawful produce, leaving it

open in every way by reason of the words “and” and “or” being introduced into the charter-party’. Similarly, in *Furness v Charles Tennant, Sons, & Co* (1892) 8 TLR 336, Lord Herschell construed a charter-party requiring the loading of ‘a full and complete cargo of sugar in hogsheads and (or) bags, or other lawful merchandise’ as entitling the charterers ‘to discharge their obligation by loading a cargo of sugar either in hogsheads or in bags, or partly in hogsheads and partly in bags.’ But the expression, or symbol, as Lord Reid preferred to call it, has been found to create difficulties. In *Millen v Grove* [1945] VLR 259 at 260 Gavan Duffy J referred to a notice to quit as having ‘invited trouble by the common and deplorable affection for the form “and/or”’. In *Looke v Parbury Henty & Co Pty Ltd* [1950] VLR 94 at 98 Barry J said:

> ‘I agree that the expression “and/or” is commonly an indication that the draftsman is not clear in his own mind about the matters with which he has to deal (cf Piesse, Elements of Drafting, pp. 52-57)’.

In *Neame v Neame's Trs*. [1956] SLT 57, the majority of the court read ‘and/or’, in a deed, as meaning nothing more than ‘and’. The Lord President, Lord Clyde, said (at 62):

> ‘But it would be most unfortunate if a confusing expression such as “and/or” were to become a common feature in Scottish marriage contracts or testamentary settlements.’

Lord Carmont, who differed from the majority, went further, and said (at 64) that in his opinion ‘the obscurity is radical’. Lord Russell concluded his judgment with the comment (at 64):

> ‘I would venture to add that in my judgment the phrase “and/or” is at best a loose and ambiguous term which would be better not to be used in formal legal writs affecting patrimonial interests.’

Lord Sorn joined the chorus of disapproval when he said (also at 64):

> ‘The expression “and/or” is not a happy one and, if occurring in a simple gift, might give rise to a serious problem of construction.’

In my opinion, the expression is particularly unhappy when it is used in a statement of claim, which should express precisely the foundation of the proceeding. In the present case, as has been explained, an almost endless series of additional and alternative allegations would be conveyed by an analysis of the claim made in this way.”

[12] In *Employers Mutual Liability Insurance Co of Wisconsin v Tollefsen* 263 NW 376 Fowler J said, at 377:

> "It is manifest that we are confronted with the task of first construing 'and/or,' that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with view to furthering the interest of their clients. We have even observed the 'thing' in statutes, in the opinions of courts, and in statements in briefs of counsel, some learned and some not."

[13] His Honour's choleric exegesis might not call for agreement in all its elements but it is difficult not to register general agreement with his underlying protest.

[14] While the conjunction "and/or" is now almost a commonplace in commercial documents and some other forms of legal drafting, it should not be used in a pleading. Pleadings are intended to clarify and concentrate the issues in an action. They will not do that if the language used leaves open to reasonable construction a large number of permutations and combinations such as occurs in this case. The pleadings join each of the defendants by "and/or" in many places. Thus, a construction of them ranges from alleging that one defendant of the five is liable to all defendants being liable.

[15] In this case, the use of the device means that the statement of claim did allege the defendants to be jointly or jointly and severally liable to the plaintiff. It follows, then, that any offer had to be made to all of the defendants and be an offer to settle the claim against all the defendants.

[16] The plaintiff argues, in the alternative, that the second, third and fourth defendants should not be regarded as "defendants" for the purposes of this rule because, although they had been served, they had not appeared.

[17] It is argued for the plaintiff that the word "defendant" and the word "defendants" in Chapter 9 Part 5 of the UCPR should be construed as meaning a defendant who has appeared and not someone who has merely been named and served. The argument proceeds on the basis that r 361 makes this apparent because it makes provision for the defendant to make an offer and contains provisions that apply in the event that such an offer is not accepted. It is submitted that such a provision could only be taken to apply to a defendant who has appeared.

[18] A defendant is a person who has been named in a pleading and has been served. From that time, such a person may not take a step in a proceeding unless that person has filed a notice of intention to defend (r 135). The term "defendant" is defined in schedule 4 of the UCPR in the following way:

> "*defendant* includes –
> (a) a person who is served with a counterclaim; or
> (b) a person who is served with a notice claiming a contribution or indemnity; or
> (c) a third, fourth or subsequent party; …"

[19] The failure to file a notice of intention to defend prevents a defendant from taking any further steps without leave. But, if judgment in default of appearance is entered, it is entered against a defendant or defendants as recognised by the rules. For the purposes of the rules, a person becomes a defendant when served and a failure to appear does not excuse a plaintiff from the obligation to serve any offer to compromise where r 363 would otherwise apply.

[20] The plaintiff argues, in the alternative, that even if his offer was not made in accordance in with the rules, he should still have an indemnity costs order made in his favour on these bases:

(a) Although the offer did not comply with the rules it was an offer capable of being accepted and would have led to a valid compromise;
(b) The offer can be viewed as a *Calderbank* offer (*Calderbank v Calderbank* [1975] 3 All ER 333); and
(c) The conduct of ATA, in not acknowledging that it had removed the bearing, led to a prolongation of the case.

[21] ATA does not argue that the reason it did not accept the offer was that it was irregular. There was no suggestion that ATA held the view that, if it and Timtalla accepted the offer, a valid compromise would not arise. Neither Timtalla nor ATA raised any point when the offer was made as to its non-compliance with the rules. Nor was it submitted that ATA did not understand at the time of receipt of the offer that a non-acceptance might have adverse costs consequences.

[22] The degree to which the offer departed from the requirements of the rules is set out above. I do not regard that departure as being of overwhelming significance. The second to fourth defendants were never served and were removed, albeit very late, from the title of the action. Their absence from the formal offer did not place Timtalla or ATA in any different position than if they had been incorporated into the offer.

[23] The non-compliance, while technical, has the effect of diluting the advantage the rules otherwise provide to an offeror and requires that I give consideration to the other matters raised by the parties.

[24] Although the offer makes no reference to costs consequences, its form was sufficient to alert the recipients that they were dealing with what would otherwise be a *Calderbank* offer. The weight of authority favours the view that a *Calderbank* offer does not lead to a presumptive entitlement to a special costs order but to an exercise of discretion in which the existence of such an offer carries considerable weight. It remains the case, though, that where an offer is made which does not comply with the rules, one of the consequences is that the offeror must show that the offeree, in not accepting the offer, acted unreasonably or imprudently. (*Commonwealth v Gretton* [2008] NSWCA 117 at [48] and [82]; *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435 at 439-444.)

[25] The matters to be taken into account and the principles to be applied are set out in the reasons of the Victorian Court of Appeal in *Hazeldene's Chicken Farm* at 440-443:

"**Calderbank offers and the award of indemnity costs**

[17] *Calderbank* letters and the consequences that flow from them have been considered by the Trial Division of this Court in a number of cases: see *M T Associates Pty Ltd v Aqua-Max Pty Ltd & Anor (No 3); Clarke v ABC; Pearson v Williams*; *Nolan v Nolan*; and *Aljade & MKIC v OCBC*.

[18] One of the seminal contributions to the law on indemnity costs was the judgment of Sheppard J in *Colgate Palmolive Company v Cussons Pty Ltd*. Amongst the circumstances listed by his Honour as having been thought to warrant the exercise of the discretion to award indemnity costs was —

> 'an imprudent refusal of an offer to compromise.'

So widely has this been accepted that the proposition has been advanced that a *Calderbank* offer gives rise to a presumption that the party rejecting the offer should pay the offeror's costs on an indemnity basis if the offeree receives a less favourable result.

[19] In *Aljade and MKIC v OCBC*, however, Redlich J rejected the notion of any such presumption, holding that the weight of authority —

> 'strongly points to an approach that involves no preconceptions about when the rejection of a *Calderbank* offer should lead to the making of a special costs order. It will do so where it is concluded that the rejection of the offer was unreasonable.'

We respectfully agree with his Honour's conclusion. We note, as did his Honour, that the notion of such a presumption has been decisively rejected by the New South Wales Court of Appeal (most recently in *Brymount Pty Ltd v Cummins (No 2)*), by the Federal Court and by the Queensland Court of Appeal.

[20] The correct approach, in our view, is to treat the rejection of a *Calderbank* offer as a matter to which the Court should have regard when considering whether to order indemnity costs. As Gyles JA stated in *SMEC Testing Services Pty Ltd v Campbelltown City Council* —

> 'In the end the question is whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rules as to costs…'

Encouraging settlement

[21] In *Grbavac v Hart*, Hayne JA cited with approval what the New South Wales Court of Appeal had said in *Maitland Hospital v Fisher (No 2)* about the policy rationale underlying the availability of special orders for costs where offers of compromise are rejected. Like his Honour, we think that what was there said is equally relevant to the exercise of the costs discretion where a *Calderbank* offer has been made. The policy objectives were said to be:

> '(1) To encourage the saving of private costs and the avoidance of the inherent risks, delays and uncertainties of litigation by promoting early offers of compromise by defendants which amount to a realistic assessment of the plaintiff's real claim which can be placed before its opponent without risk that its 'bottom line' will be revealed to the court;
>
> (2) To save the public costs which are necessarily incurred in litigation which events demonstrate to have been unnecessary, having regard to an earlier (and, as found, reasonable) offer of compromise made by a plaintiff to a defendant; and
>
> (3) To indemnify the plaintiff who has made the offer of compromise, later found to have been reasonable, against the costs thereafter incurred. This is deemed appropriate because, from the time of the rejection or deemed rejection of the compromise offer, notionally the real cause and occasion of the litigation is the attitude adopted by the defendant which has rejected the compromise. In such circumstances that party should ordinarily bear the costs of litigation.'

[22] At the same time, as Redlich J said in *Aljade*, there are other competing objectives of equal importance.

> 'Potential litigants should not be discouraged from bringing their disputes to the Courts. It is such considerations which underlie the general rule that an order for special costs should only be made in special circumstances.'

The test of unreasonable rejection

[23] In our view, these competing considerations can be sufficiently accommodated by applying a test of (un)reasonableness. The critical question is whether the rejection of the offer was unreasonable in the circumstances. We see no justification for a more stringent test such as 'manifestly' or 'plainly' unreasonable.

[24] Of course, deciding whether conduct is 'reasonable' or 'unreasonable' will always involve matters of judgment and impression. These are questions about which different judges might properly arrive at different conclusions. As Gleeson CJ said recently, 'unreasonableness is a protean concept'. But a test of reasonableness is, we think, entirely appropriate to the exercise of a discretion such as this.

Factors relevant to assessing reasonableness

[25] The discretion with respect to costs must, like every other discretion, be exercised taking into account all relevant considerations and ignoring all irrelevant considerations. It is neither possible nor desirable to give an exhaustive list of relevant circumstances. At the same time, a court considering a submission that the rejection of a *Calderbank* offer was unreasonable should ordinarily have regard at least to the following matters:

(a) the stage of the proceeding at which the offer was received;
(b) the time allowed to the offeree to consider the offer;
(c) the extent of the compromise offered;
(d) the offeree's prospects of success, assessed as at the date of the offer;
(e) the clarity with which the terms of the offer were expressed;
(f) whether the offer foreshadowed an application for an indemnity costs in the event of the offeree's rejecting it.

[26] It has been argued on occasion that the maker of a *Calderbank* offer should not be entitled to costs unless the offer sets out, with some reasonable specificity, the basis for the offeror's contention that the offeree should accept the compromise — for example, because the offeree's case was hopeless or because the offeree had no reasonable prospects of doing better in the proceeding than was being offered in advance.

[27] Once again, we think it neither necessary nor desirable to lay down any general rule in this regard. We agree with what Redlich J said in *Aljade*, as follows:

> 'Any attempt to prescribe the reasoning which must accompany [a *Calderbank*] offer should be resisted. Whether there is a need for the offeror to descend to specificity as to why the offer should be accepted must depend upon a consideration of all of the circumstances existing at the time of the offer. The extent to which the weakness of a party's position is exposed through the pleadings, affidavits and the various communications between the parties during the course of the litigation may bear upon the

> significance of the absence of specificity in the informal offer.'
>
> [28] As we said at the outset, the unreasonable refusal of an offer of compromise is, by itself, a proper ground for the award of indemnity costs or — in the present case — the award of solicitor-client costs. It follows that it is not necessary for the applicant for such an order to establish matters which might be relevant to other, well-recognised, grounds for indemnity costs. Once again we would adopt what Redlich J said in *Aljade*, as follows:
>
> > 'It is not necessary to establish misconduct by the offeree before the rejection of the offer can be viewed as unreasonable. Lack of merit in the way a party has conducted its case is not a pre-requisite for the making of an indemnity costs order [on this ground].'
>
> [29] Nor is it necessary for the applicant offeror to show that the offeree acted with 'wilful disregard of known facts or clearly established law', or that it acted with 'high-handed presumption'. We agree with Redlich J that such conduct is not a prerequisite for a finding that the rejection of a *Calderbank* offer was unreasonable." (citations omitted)

[26] The submissions from ATA on why it was not unreasonable to accept the offer are with respect to both liability and quantum. On liability it refers to the availability at the time of the offer of expert reports and submits that, at that time, there was no report which provided evidence which could have led to a finding of liability against either the first or fifth defendant. The relevant point, though, is that a finding was made at trial that the fifth defendant was responsible for the removal of the particular bearing during the course of servicing the helicopter. This was evidence that emerged during cross-examination of a person who had been an employee of ATA and it had substantial importance for the eventual determination of liability. The circumstances relating to the removal of the bearing were within the corporate knowledge of ATA and did not require an expert report to establish that point. The expert reports which were supplied in 2009 and 2010 by Dr Gilmour went more to the point of whether or not the failure was one which took place over time or was, as I found, one which took place without warning.

[27] The defendant also argues that it could not have foreseen the evidence of future economic loss which was adduced at trial and which resulted in an increased judgment amount. At the time the offer to settle was made the plaintiff had not served a statement of loss and damage.

[28] In *Castro v Hillery* [2003] 1 Qd R 651, the Court of Appeal considered the matters relevant to the exercise of a discretion in these circumstances and emphasised 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. This is to be assessed in the light of the circumstances as they existed at the time of the offer. The Court of Appeal also referred to a decision of the New South Wales Court of Appeal in *Morgan v Johnson* (1998) 44 NSWLR 578, where the principles applicable to the

exercise of the discretion under the cognate costs provisions of New South Wales legislation was considered. Those principles were summarised in *McChesney v Singh & Ors* [2004] QCA 217, at [13], in the following way:

> "(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."

[29] The submission of ATA also refers to the absence of any expert evidence relating to economic loss. It is correct that there was no such evidence available at that time. There were, though, reports available from two orthopaedic surgeons, an expert in rehabilitation medicine, a rehabilitation physiotherapist, a pain clinic consultant, and an occupational therapist. The injuries suffered by the plaintiff were well known to ATA at the relevant time. They were substantial and extensive. It must have been clear that the quantum of damages would be quite high and that, with respect to economic loss, the plaintiff was more likely than not to offer a substantial loss. Indeed, the evidence which became available later with respect to the plaintiff's work as a sculptor served to alter the award which might otherwise have been made because of the income which he received from that venture.

[30] This is not a case in which some substantially new and different evidence became available after the offer. This is an example where, had the offer been accepted, ATA would have been in a much better position than eventually obtained. The offer was made some six years after the accident and four years after the action had commenced. The fifth defendant had already made its own enquiries about the circumstances of the accident and it had been investigated by independent bodies. The material available to it demonstrated that the plaintiff had suffered serious injuries which would inevitably lead to economic loss of a substantial nature. An offerer does not have to have all relevant material available to it before it can assess an offer made. The material which ATA did have was sufficient for it to make an assessment and its failure to accept the offer was unreasonable in those circumstances. It is in those circumstances appropriate that I order that ATA pay the plaintiff's costs on an indemnity basis since the making of the offer and on the standard basis for the balance.

Sanderson Order?

[31] The plaintiff seeks an order that ATA pay Timtalla's costs, that is, a *Sanderson* order (*Sanderson v Blyth Theatre Co* [1903] 2 KB 533). A *Sanderson* order has been described as "the modern form of order" (*Johnson's Tyne Foundry Pty Ltd v Maffra Corporation* (1948) 77 CLR 544, 572) when compared to a *Bullock* order (*Bullock v London General Omnibus Company* [1907] 1 KB 264). In the circumstances of this case there is no practical difference so far as the grounds necessary to justify such an order are concerned.

[32] The rationale for making for making a *Bullock* order was explained by King CJ in *Fennell v Supervision and Engineering Services Holding Pty Ltd* (1988) 47 SASR 6. His words apply equally to *Sanderson* orders. He said, at 7-8:

> "The final issue relates to the refusal of the trial judge to make an order, the so-called Bullock order, that Santos Ltd pay the costs which the appellant has been ordered to pay to the first defendant. The principle of justice upon which the Bullock order rests may, in my opinion, be stated thus. The unsuccessful defendant has caused the litigation by his wrongful act and by disputing liability for it. He therefore ought to pay all costs reasonably incurred by the plaintiff in connection with the litigation. If it was reasonable, as between the plaintiff and the unsuccessful defendant, for the plaintiff to sue the successful defendant, the unsuccessful defendant ought therefore in justice be liable to indemnify the plaintiff against the costs of so doing, including those which he is ordered to pay to the successful defendant. In many cases the basis for the plaintiff's claim of reasonableness in joining the successful defendant will be the conduct of the unsuccessful defendant in placing the blame on the successful defendant. That conduct is, however secondary to the underlying principle of justice indicated above. The principle is stated in *Gould v Vaggelas* (1984) 157 CLR 215 by Wilson J (with whose judgment on the point Murphy J agreed) at 247: 'Such an order may be made where the costs in question have been reasonably and properly incurred by the plaintiff as between him and the unsuccessful defendant.' Gibbs CJ (at 229) also formulated the principle in those terms. He approved, however, a formulation of the principle by Blackburn CJ in *Steppke v National Capital Development Commission* (1978) 39 LGRA 94 at 100 in terms 'that the conduct of the unsuccessful defendant has been such as to make it fair to impose some liability on it for the costs of the successful defendant'. Of course, if the word 'conduct' is used in a sense wide enough to include the commission of the wrongful act and the contesting of liability, there may not be much difference between the two approaches. Brennan J also referred to conduct in his formulation of the principle. It is pertinent that in *Gould v Vaggelas* (supra) the justification for the Bullock order was the conduct of the unsuccessful defendant 'by denying inducement and placing reliance upon the independent advice tendered by the successful defendant', per Brennan J (at 260)."

[33] In *Lackersteen v Jones (No 2)* (1988) 93 FLR 442, Asche CJ considered, among other cases, *Gould v Vaggelas* and arrived (at 449) at this useful summary:

> "From those cases therefore the following principles seem to be established before a judge can make a 'Bullock' or 'Sanderson' order.
>
> 1. It must be seen to have been reasonable and proper for the plaintiff to have sued the successful defendant.
> 2. The causes of action against two or more defendants need not be the same but they must be substantially connected or dependent the one on the other.
> 3. While it is essential to find that the plaintiff has acted reasonably and properly that alone is not sufficient. The court must find something in the conduct of the unsuccessful defendant which makes it a proper exercise of discretion.
> 4. Finally, in considering whether to make such an order, the court should, in the exercise of its discretion balance overall two considerations of policy: the first, that an unnecessary multiplicity of actions should not be forced on litigants, so that a plaintiff who acts reasonably in joining two or more defendants should not be penalised or lose the fruits of his victory in costs on the basis that he should have either elected or taken separate actions; secondly, that an unsuccessful defendant should not have to pay more than one set of costs merely because he is unsuccessful."

[34] The first question to be asked in this case is: was it reasonable for the plaintiff to join Timtalla? As Vaughan Williams LJ said in *Besterman v British Motor Cab Company Ltd* [1914] 3 KB 181 at 187:

> "…if the facts are such that it is reasonable to join them both and reasonable to be in a state of uncertainty as to which of the two is the really guilty one, then it is part of the reasonable costs of the action that the costs of the action which you have launched against one of those defendants, and who has succeeded in defending himself, should be borne by the man who is to blame."

[35] As I observed in my reasons (*St Clair v Timtalla Pty Ltd & Anor* [2010] QSC 296, [25]):

> "On the case that was pleaded and conducted the NTN bearing must have been:
>
> (a) in place when the helicopter was handed over; or
> (b) installed by someone other than the plaintiff during the period it was in the plaintiff's possession."

[36] ATA had not admitted in its pleading that the bearing had been removed by it. Prior to the trial Mr Fisher had told Mr Nunan that he had not removed the bearing and, so, would be contradicting the account of Mr Chadbourne as to what he had said on an earlier occasion. At the trial, Mr Fisher admitted that he had been in a position to

detect that an NTN bearing had been installed in the helicopter. The pleading of ATA left in issue an important fact, notwithstanding that it was not in a position to dispute such a fact. In these circumstances, that was conduct which encouraged or compelled St Clair to continue to press the claim against Timtalla. The conduct of ATA placed St Clair in a position where he had to continue his action against Timtalla. To do otherwise would have given rise to a substantial risk that if he proceeded only against ATA his claim might have failed altogether.

[37] The plaintiff also pointed to two other matters as supporting a *Sanderson* order. The first related to ATA's alleged non-disclosure with respect to insurance. I do not regard that as a matter which necessarily would compel the making of such an order and, in any case, it appears that St Clair's solicitors had some information about the insurance status of ATA.

[38] The other point made on behalf of the plaintiff was that Timtalla and ATA conducted their defence of the case jointly for their mutual benefit. This point has merits on each side. It is important that parties be allowed to confine their costs so far as possible by engaging the same set of lawyers. But, at the same time, it meant that Timtalla must be taken, at least through its lawyers, to have been aware of the true state of affairs with respect to the removal of the bearing and Mr Fisher's knowledge of what occurred.

[39] I am satisfied that it was reasonable and proper for St Clair to have sued and continued to sue Timtalla. Further, the causes of action against the two defendants were substantially connected and Timtalla must be taken to have been aware through the joint conduct of its case with ATA of the actions of ATA's agent or employee. Certainly, had St Clair only sued ATA and failed then it would have been open to him to bring a further action against Timtalla. Multiplicity of actions is frowned upon and should not be forced upon litigants.

[40] I order that ATA pay Timtalla's costs of and incidental to this action on the standard basis.