SUPREME COURT OF QUEENSLAND

CITATION:	*Brooks v Zammit & Anor (No. 2)* [2011] QSC 186
PARTIES:	**PATRICIA BROOKS** **(**plaintiff) **v** **MICHELLE ZAMMIT** (first defendant) **And** **SUNCORP METWAY INSURANCE LTD** **ABN 83 075 695 966** (second defendant)
FILE NO/S:	S122 of 2010
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court Mackay
DELIVERED ON:	22 June 2011
DELIVERED AT:	Rockhampton
HEARING DATE:	22 June 2011
JUDGE:	McMeekin J
ORDER:	**1. The plaintiff pay the second defendant's costs of the application to adjourn the trial in the May sittings of the circuit court at Mackay.** **2. The plaintiff pay any costs incurred by the second defendant in its application to adduce further expert evidence brought in the May sittings of the circuit court at Mackay.** **3. Subject to the forgoing orders, the second defendant pay the plaintiff's costs of the proceedings on the indemnity basis.**
CATCHWORDS:	PROCEDURE – COSTS – on which basis costs should be awarded – costs of adjourned hearing thrown away – costs of application for additional evidence *Uniform Civil Procedure Rules* 1999 (Qld) *Brooks v Zammit & Anor* [2011] QSC 181
COUNSEL:	GF Crow SC for the plaintiff R Green for the second defendant

SOLICITORS: Macrossan & Amiet for the plaintiff

Grant & Simpson for the second defendant

[1] **McMEEKIN J:** On 22 June 2011 I gave judgment in favour of the plaintiff against the second defendant in the sum of $689,379.52[1] and indicated I would hear from counsel on costs. Later that day I heard oral submissions and reserved the question of costs.

[2] The plaintiff seeks costs of the proceedings on the indemnity basis. The second defendant opposes that order and contends that I should make the following orders:

(a) order the plaintiff to pay the defendant's costs of an adjourned hearing thrown away;

(b) order the plaintiff to pay the defendant's costs of an application for leave to adduce evidence from an occupational therapist;

(c) order the second defendant to pay the plaintiff's costs of the proceedings on the standard basis.

Costs of the Adjourned Hearing

[3] In early May 2011 the matter was to be heard in the sittings of the circuit court in Mackay. The defendant filed an application to adjourn the trial because of the late receipt of expert evidence opinion from the plaintiff. The defendant contended that it needed time to respond to that material by seeking a report from an occupational therapist.

[4] As matters transpired the criminal work before Cullinane J in that sittings prevented the trial going ahead in any case. Hence Cullinane J had no need to determine the application. That was not known at the time of filing of the adjournment application and supporting affidavit.

[5] The expert opinion evidence went to the issue of care and assistance that the plaintiff required.

[6] In the hypothetical situation of the trial being expected to proceed in that sittings of the circuit court and had I been required to hear and determine the application, I have no doubt that I would have acceded to it. Care was a very significant component of the plaintiff's eventual award – over 50% of it. It was essential that the defendant have the opportunity to explore the new opinions.

[7] However the trial did not go off because of any acceptance of these arguments – it would have been adjourned regardless.

[8] That being so the proper order it seems to me is that the plaintiff pay the second defendant's costs of the application to adjourn but not the costs thrown away by reason of the trial not proceeding due to the court being unavailable.

[9] Allied with this is an application for costs of an application to adduce further expert evidence. I am told that was eventually resolved by consent. Again I would have acceded to that application. If any costs were incurred by the second defendant in having to come before the court for leave to adduce evidence to meet the new opinions then it is appropriate that the plaintiff bear them.

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[1] See [2011] QSC 181

Indemnity Costs

[10] The plaintiff relies on a formal offer in the amount of $550,000 made on 16 November 2010 pursuant to the *Uniform Civil Procedure Rules* 1999 (UCPR). Rule 360 provides:

> "360 Costs if offer to settle by plaintiff
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> (1) If—
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> (a) the plaintiff makes an offer to settle that is not accepted by the defendant and the plaintiff obtains a judgment no less favourable than the offer to settle; and
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> (b) the court is satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer;
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> 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.

[11] As well the plaintiff points out that her mandatory offer made prior to commencement of proceedings was in the sum of $650,000, again less than the eventual judgment.

[12] The defendant submits that another order is appropriate. It relies on the following matters:

(a) following the formal offer the evidence changed in a material way. The plaintiff adduced further opinion evidence and advised the defendant of it by delivery of notes of evidence on 19 April 2011 (Drs Campbell and Shaw) and 27 April 2011 (Ms Purse);

(b) the second defendant increased its formal offer from $480,000 (made on 2nd March 2011) to the plaintiff's figure of $550,000 (made on 31st March 2011).

[13] There is no doubt that the further opinions of Ms Purse were of some significance. She addressed directly the prospect of the plaintiff's condition worsening with age. I specifically referred to her opinions and relied on them in reaching my views as to the proper level of care.[2] They therefore materially affected the eventual assessment of damages.

[14] The difficulty for the defendant's argument is that, while material, the increase in the award brought about thereby does not bridge the gap between the offer and the judgment. It can be seen from [78] of the reasons that the level of care adopted at present was more or less in line with the original views – 6 hours care per week plus two hours driving assistance plus one hour for the carer's need to drive to the home because of its remote location. The increase brought about by the new opinions was in the allowance made over and above that level of care. That can be accurately

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[2] See [2011] QSC 181 paras [69]-[72] and [78]

calculated. Adopting the level of care without any deterioration would have resulted in an award of about $220,000[3] – about $80,000 less than the amount in fact awarded.

[15] While I am sympathetic to the defendant's complaints about the changing in the evidence and that within four months it met the plaintiff's own formal offer, in my view, those maters do not justify another order, as the rule requires.

[16] There is a further matter that concerned me. Rule 360 requires that "the court [be] satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer." Ms Brooks was not prepared to settle for $550,000, the amount of her formal offer, in late March 2011 and before the material change in evidence came about in April. That raises the issue as to whether I can be satisfied – the onus presumably being on the plaintiff – that she was in fact willing to carry out what was proposed in the offer. I am disadvantaged in that no argument has been addressed on that subject.

[17] The terms of the offer are not before me. The usual form of the offer is that the amount specified be paid within 14 days that being the minimum period required by the UCPR rule 355(1).

[18] That being so I assume that all that the plaintiff offered to do was to accept the nominated sum if paid within 14 days of service of the offer. A reluctance to accept that amount four months later is not relevant, at least necessarily so, to the issue raised in subrule 360(1)(b).

[19] I am not satisfied that another order is appropriate in all the circumstances. The rule is in a mandatory form. That is so to reflect the encouragement that the Court wishes to give to parties to avoid trials where possible and settle matters.

Orders

[20] The orders will be:

(a) the plaintiff pay the second defendant's costs of the application to adjourn the trial in the May sittings of the circuit court at Mackay;

(b) the plaintiff pay any costs incurred by the second defendant in its application to adduce further expert evidence brought in the May sittings of the circuit court at Mackay;

(c) subject to the forgoing orders the second defendant pay the plaintiff's costs of the proceedings on the indemnity basis.

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[3] See [2011] QSC 181 f/n 20 at p 12 - $235.80 x 938