SUPREME COURT OF QUEENSLAND

CITATION:	*Queensland Timber Wholesalers (Production) Pty Ltd v Hatton & Anor* [2012] QCA 128
PARTIES:	**QUEENSLAND TIMBER WHOLESALERS (PRODUCTION) PTY LTD** ACN 009 704 714 (applicant) **v** **PAUL HATTON** (first respondent) **INGRID HATTON** (second respondent)
FILE NO/S:	Appeal No 10855 of 2011 DC No 2893 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	18 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	17 April 2012
JUDGES:	Margaret McMurdo P and Fraser JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The applicant's application to adduce further evidence is granted.** **2. The respondents' application to adduce further evidence is granted.** **3. The application for leave to appeal is refused with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the self-represented respondents appeared by telephone to receive judgment – where primary judge gave judgment for the applicant and then invited submissions on costs – where the applicant's counsel submitted that as an offer to settle had previously been made it was entitled to costs on an indemnity basis pursuant to UCPR, r 360 – where costs were awarded on the standard basis – whether the offer to settle complied with the UCPR – whether leave should be granted

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – ADMISSIONS OF FURTHER EVIDENCE – IN GENERAL – where both parties sought to adduce affidavit evidence regarding whether the offer to settle was sent and received – whether leave should be granted to adduce further evidence on appeal

District Court of Queensland Act 1967 (Qld), s 118(3)
Supreme Court Act 1995 (Qld), s 253
Uniform Civil Procedure Rules 1999 (Qld), r 360, r 766

Beardmore v Franklins Management Services Pty Ltd [2003] 1 Qd R 1; [2002] QCA 60, cited
Cameron v Nominal Defendant [2001] 1 Qd R 476; [2000] QCA 137, cited
Queensland Timber Wholesalers (Production) Pty Ltd v Hatton & Anor [2011] QDC, unreported, Clare SC DCJ, DC No 2893 of 2009, 20 October 2011, related
Smith v Ash [2011] 2 Qd R 175; [2010] QCA 112, cited
Ward v Coomber [2005] QDC 251, cited

COUNSEL: H Trotter for the applicant
A C Stumer for the respondents

SOLICITORS: Anderssen & Company Solicitors for the applicant
Hopgood Ganim Lawyers for the respondents

[1] **MARGARET McMURDO P:** This is an application for leave to appeal under s 118(3) *District Court of Queensland Act* 1967 (Qld) against a costs order.[1] On 20 October 2011, the judge gave judgment for the applicant, Queensland Timber Wholesalers (Production) Pty Ltd against the respondents, Paul Hatton and Ingrid Hatton, in the amount of $53,372.25 with interest from 3 December 2008 until 20 October 2011 and thereafter pursuant to the *Supreme Court Act* 1995 (Qld). The respondents were self-represented at the trial which took place on 7 and 8 September 2011 and appeared by telephone to receive the judgment. After delivering the judgment, her Honour invited submissions as to costs. Counsel for the applicant contended that an offer to settle had been made under the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) which was equal to or greater than the judgment sum given in its favour so that under UCPR r 360 it was entitled to costs of the trial on an indemnity basis. The judge did not accept that contention and awarded costs in the applicant's favour but on the standard basis.

[2] Counsel for the applicant claims the judge erred in awarding costs on the standard basis in light of UCPR r 360. He submits that leave should be granted and the appeal allowed with costs. He contends that this Court should re-exercise its discretion and award the applicant the costs of the trial on an indemnity basis.

[3] The respondents contend this is not a proper case in which leave to appeal should be given. If leave is given, the respondents have filed a notice of contention and

---

[1] The provisions of the Civil Proceedings Bill 2011 (Qld) requiring that a District Court judge give leave to appeal before the initiation of an appeal against costs (other than s 254 *Supreme Court Act* 1995 (Qld)) has not yet come into operation. See Civil Proceedings Bill 2011 (Qld) ss 138(2), 139; Explanatory Memorandum, Civil Proceedings Bill 2011 (Qld) 20, cls 138, 139.

submit that this Court should affirm the judge's costs order on a ground other than that relied upon by the primary judge.

[4] Both the applicant and the respondents have applied to adduce further evidence under UCPR r 766(1)(c).

The costs proceedings in the District Court

[5] The hearing as to the costs order did not proceed as it should have. As I have noted, the respondents were self-represented and accepted judgment by telephone. It is clear from the transcript that they were not in receipt of a copy of the reasons for judgment prior to the argument as to costs. The judge told them her associate would take their email address when the court adjourned and would both email and post them a copy. Counsel for the applicant stated that his client had made a formal offer to the respondents under Pt 5 of the UCPR. The offer had not been filed in court but it was provided to the respondents. His solicitor had "prepared an affidavit which speaks to its service and to the value of the offer therein. It exhibits the offer… ." The judge made enquiries as to the amount of the offer and after some discussion it became clear that it was for a total of $56,306.50. Counsel submitted this was "an offer to settle that is not accepted by the [respondents] and the [applicant] obtain[ed] a judgment no less favourable than the offer to settle" under UCPR r 360(1)(a) so that Court must order the respondents to pay the applicant's costs calculated on the indemnity basis.

[6] Neither the transcript nor the court file suggests that the judge gave leave to file and read the affidavit of service exhibiting the offer and nor was the offer tendered. Her Honour, however, did appear to accept that the offer was served and that it was for an amount less than the judgment sum obtained by the applicant.

[7] The judge then invited the respondents to make submissions about costs of the trial. The male respondent stated that he did not think they should pay any costs and the following exchange occurred:

> "HER HONOUR: I can understand that, but you understand I tried to tell you during the trial that there would be costs' implications if you were to lose and to warn you about the risk that is taken in defending a claim.
>
> [MALE RESPONDENT]: Yes, your Honour.
>
> HER HONOUR: And the reason for that is that there are rules that provide that the party who loses normally carries the cost of the other side. [Counsel for the applicant] has asked me to order indemnity costs which are costs for the real costs of the [applicant's] lawyers. I'm not going to do that, I'm going to order costs against you but on the standard basis, which is in accordance with the scale, which will be significantly less than the real costs to the [applicant].
>
> [MALE RESPONDENT]: Yes, your Honour.
>
> [FEMALE RESPONDENT]: Thank you.
>
> [COUNSEL FOR THE APPLICANT]: With respect, your Honour, rule 360 (2) provides that the Court must in fact award indemnity costs.
>
> HER HONOUR: Is there no discretion?

> [COUNSEL FOR THE APPLICANT]: No, I do not believe there is, your Honour. Sorry, subrule (1) provides that the Court must order the [respondents] pay the [applicant's] costs calculated on the indemnity basis, unless the [respondent] shows another order for costs is appropriate in the circumstances.
>
> Your Honour, this has been a very trying matter for my client in circumstances where we've always been certain of our correctness and the offer to settle was made to reflect our certainty, the strength of our position. To not award my client indemnity costs is to punish my client for no great reason there.
>
> HER HONOUR: I understand that the starting point is an award of indemnity costs, but in the circumstances of this case where the defence was amounted in good faith and the challenge to the… [applicant's] case was fairly confined, I'm of the view that it isn't appropriate to order indemnity costs.
>
> The [respondents] are to pay the [applicant's] costs on the standard basis."

The applications to adduce further evidence

[8] The applicant now seeks leave to adduce affidavit evidence from its solicitor and his secretary. The solicitor deposes that he made the offer to settle to the respondents on or about 12 July 2011. The offer was posted to the respondents' address for service. The offer stated that it was "made pursuant to Part 5 of the Uniform Civil Procedure Rules".

[9] The solicitor's secretary deposes that on 12 July 2011 she placed the offer to settle in an envelope addressed to the respondents which she stamped and put with the day's mail into an Australia Post letterbox. She noted in the firm's postage register that it had been posted. She then placed a copy of the unsigned letter and the signed offer enclosure on the client's file.

[10] The respondents, who are now legally represented, seek leave to give affidavit evidence to the effect that they reside in a rural area with no street address. Mail is delivered twice weekly to a letterbox at the front fence. One or other of the respondents checks the letterbox on mail delivery days. Neither received any offer to settle from the applicant. The male respondent conducted the litigation on behalf of both respondents. Neither respondent knew of any offer to settle prior to the hearing on 20 October 2011. The male respondent deposed that he could not clearly hear everything that was said in court that day as he appeared by telephone link. He did not recall hearing a reference to any offer to settle. If the offer was discussed, he did not appreciate its significance. Until he was served with a copy of the applicant's leave to appeal, he did not know about the offer.

[11] The evidence from both parties is so crucial to the central issues in this application that it should be received by this Court under UCPR r 766(1)(c).

Does s 253 *Supreme Court Act* 1995 (Qld) apply to costs orders from the District Court?

[12] The respondents submit that leave to appeal is incompetent without leave of the primary judge. Section 253 *Supreme Court Act* 1995 (Qld), which provides that there can be no appeal from an order of a Supreme Court judge as to costs only

without leave of the judge, they argue, applies equally to costs appeals from the District Court. In making this submission, they rely on Ambrose J's observations in *Beardmore v Franklins Management Services Pty Ltd*.[2]

[13] Although legislative change is imminent,[3] that submission does not reflect the present law. Section 253 *Supreme Court Act* 1995 applies only to costs orders made in the Supreme Court, not the District Court: see *Cameron v Nominal Defendant*;[4] *Beardmore v Franklins Management Services Pty Ltd*[5] and *Smith v Ash*.[6] The applicant did not need leave of the primary judge to pursue its appeal rights in respect of the costs order.

Was the offer to settle made under Pt 5 of Ch 9 of the UCPR?

[14] The next question to determine is whether the offer to settle under r 360 was an offer to settle made under Pt 5 of Ch 9 of the UCPR. The respondents contend that as they did not receive the offer, there was no offer to settle under the UCPR. Alternatively, they submit the offer was not an offer under Pt 5 of the UCPR because it stated only that it was made under Pt 5 of the UCPR and made no reference to Ch 9.

[15] Chapter 9 Pt 5 of the UCPR relevantly provides:

> "**352 Definitions for pt 5**
>
> In this part—
>
> ***offer*** means an offer made under this part.
>
> ***offer to settle*** means an offer to settle made under this part.
>
> **353 If offer to settle available**
>
> (1) A party to a proceeding may serve on another party to the proceeding an offer to settle 1 or more of the claims in the proceeding on the conditions specified in the offer to settle.
>
> …
>
> (3) An offer to settle must be in writing and must contain a statement that it is made under this part.
>
> **354 Time for making offer**
>
> (1) An offer to settle may be served—
>
> …
>
> (b) … at any time before final relief is granted.
>
> …
>
> **360 Costs if offer to settle by plaintiff**
>
> (1) If—

---

2 [2003] 1 Qd R 1, 24–25 [109]–[118].
3 See fn 1.
4 [2001] 1 Qd R 476, 476–477 [2]–[6].
5 [2003] 1 Qd R 1, 10 [15]–[19].
6 [2011] 2 Qd R 175, 177 [6], 195–196 [88].

(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."

[16] As to service, the UCPR relevantly provides:

"**Part 4 Ordinary service**

112 How ordinary service is performed

(1) If these rules do not require personal service of a document, the following are ways by which the document may be served on the person to be served—

…

(d) posting it to the relevant address;

…

(3) In this rule—

relevant address, of a person to be served, means—

(a) the person's address for service; or

(b) for an individual who does not have an address for service—

(i) the individual's last known place of business or residence; …

…

120 Affidavit of service

(1) If an affidavit of service of a document is required under these rules or an Act or law, the affidavit—

…

(b) …

(i) must state the relevant dates and the facts showing service; and

(ii) may be made on information given to, or the belief of, the person causing the service; and

(iii) if made on information given to the person—must state the source of the information.

(2) An affidavit of service must—

(a) have the document filed with it as an exhibit or be written on the document; or

(b) if the document has been filed—mention the document in a way sufficient to enable the document to be identified."

[17] It is common ground that the offer to settle was for an amount less than the judgment sum obtained by the applicant.

[18] The respondents' undisputed evidence is that they did not receive the offer to settle. There seems no reason for this Court not to accept that evidence especially in circumstances where the primary judge, although awarding judgment against them, made no findings against their credibility.[7] In the same exchange where the judge explained to them that the significance of the offer was that it could lead to an order against them for indemnity costs, the judge told them that she was not going to award indemnity costs against them.[8] It is not surprising that in those circumstances they did not tell the primary judge they did not receive the offer.

[19] I will deal first with the respondents' contention that an offer to settle stated to be made under Pt 5 of the UCPR is not an offer under the UCPR as it did not refer to Ch 9 UCPR.

[20] The offer stated that it was an offer to settle "pursuant to Part 5 of the [UCPR]". Although other chapters in the UCPR contain a Pt 5, Ch 9 is the only chapter of the UCPR which deals with offers to settle. For that reason, I consider that an offer to settle that states it is being made "pursuant to Part 5 of the [UCPR]" does comply with r 353(3).[9] This contention is without substance.

[21] I turn now to the respondents' contention that an offer to settle that is not received by a party is not an offer to settle under Pt 5 Ch 9 of the UCPR.

[22] There is nothing in the terms of the relevant provisions of the UCPR set out above which require personal service of an offer to settle. An offer to settle can be made by serving it in accordance with the UCPR. So much is contemplated by the terms of r 352 to r 354. That construction is consistent with the commendable intention apparent from r 5 and Pt 5 Ch 9 of the UCPR to encourage by the use of indemnity costs the speedy and sensible early resolution of civil proceedings. But the fact that a defendant shows an offer to settle was not received must be highly relevant in determining whether the defendant has shown under r 360(1)(b) that an order other than costs calculated on the indemnity basis is appropriate.

Should leave to appeal be given?

[23] The judge seemed to accept that an offer to settle had been made under r 360(1)(a). Under r 360(1)(b), the court must order indemnity costs unless the respondents showed another order for costs was appropriate in the circumstances. The respondents' case, according to the primary judge's reasons, had no prospect of success on the evidence.[10] If the applicant had made an offer to settle to the respondents under r 360(1)(a), the judge's reasons for not awarding indemnity costs

---

7 *Queensland Timber Wholesalers (Production) Pty Ltd v Hatton & Anor* [2011] QDC, unreported, Clare SC DCJ, DC No 2893 of 2009, 20 October 2011, [15].

8 See [7] of these reasons.

9 This was also the conclusion reached by Dodds DCJ in *Ward v Coomber* [2005] QDC 251, [9].

10 *Queensland Timber Wholesalers (Production) Pty Ltd v Hatton & Anor* [2011] QDC, unreported, Clare SC DCJ, DC 2893 of 2009, 20 October 2011, [15], [18].

under r 360(1)(b) (that the defence was mounted in good faith and fairly confined)[11] were inadequate. Ordinarily that would be sufficient to warrant the granting of leave to appeal and allow the appeal so that this Court could re-exercise its discretion.

[24] But there are unusual factors in this case. It seems likely, had the matter proceeded as it should have at the costs hearing, that the following would have occurred. The unrepresented respondents would have been given notice that the applicant intended to ask for indemnity costs on the basis of their offer to settle made under Pt 5 Ch 9 of the UCPR. The judge would have considered the relevant provisions of the UCPR. The respondents would then have informed the judge that they had never received such an offer. The judge would have given the applicant leave to file and read the affidavit of service exhibiting the offer to settle and would have taken oral evidence or adjourned the hearing to enable the respondents to prepare affidavit evidence setting out that they did not receive the offer. The judge, as this Court has done on the evidence now before it, would have accepted the respondents' undisputed evidence that they did not receive the offer. The judge would then have determined that under r 360(1)(b) that the respondents had shown why an order for costs on the standard basis rather than the indemnity basis was appropriate, despite the applicant's offer to settle which satisfied r 360(1)(a). As the respondents did not receive the offer, it would be unjust to penalise them with indemnity costs for not accepting the offer.

[25] In the peculiar circumstances of this case, where it now appears that had regular procedures been followed the judge would almost certainly have made the same order but for proper reasons, this is not an appropriate case in which to grant leave to appeal.

[26] I appreciate that this is disappointing for the applicant, the successful plaintiff at trial, which has been deprived of indemnity costs when it made a sensible offer to settle which complied with r 360(1)(a). But its lawyers could easily have enquired of the self-represented respondents prior to or at trial whether they received the offer to settle. Had they ascertained the respondents did not receive the offer, they could have resubmitted it at any time before judgment: see UCPR r 354(1)(b). If the respondents gave the applicant's lawyers cause to believe they had received the offer to settle, this would have been convincing evidence that they did receive the offer.

[27] I would refuse the application for leave to appeal. It is unnecessary to deal with the respondents' notice of contention.

ORDERS:

1. The applicant's application to adduce further evidence is granted.

2. The respondents' application to adduce further evidence is granted.

3. The application for leave to appeal is refused with costs.

[28] **FRASER JA:** I agree with the reasons for judgment of the President and the orders proposed by her Honour.

[29] **MULLINS J:** I agree with the President.

---

[11] See [7] of these reasons.