SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

PHILIPPIDES J

No 11830 of 2009

MARK ADRIAN ROLLS	Applicant
and	
LINDA REGINA RADFORD & ORS	Respondent

BRISBANE

..DATE 27/04/2012

ORDER

HER HONOUR: The plaintiff succeeded in its claim and obtained a declaration that he was entitled to the sum of $50,000 paid as deposit under the contract between the parties upon the termination of the contract.

The issue that presently remains for determination concerns the costs order that should be made.

The plaintiff seeks costs of the proceeding on the indemnity basis, relying on an offer to settle dated 29 December 2011. The defendants make two submissions in relation to the issue of costs:

(a) any order for costs in favour of the plaintiff should be on the standard basis, and

(b) the defendants should not recover costs incurred in relation to an allegation of sale at an undervalue because that issue was abandoned before trial.

Pursuant to an order of the Court, the disputed $50,000 was paid into Court. The offer that was made dated 29 December 2011 to settle the proceedings provided as follows:

(a) $49,900 of the $50,000 paid into Court plus interest accrued on the $50,000 held by the Court be paid to the plaintiff;

(b) the balance of $100 of the $50,000 paid into Court be paid

to the defendants;

(c) the defendants pay the plaintiff's costs of the proceeding on the standard basis; and

(d) the defendants counterclaim be dismissed.

The defendants sought information as to the likely amount of the plaintiff's costs in respect of the offer that was made. That quantification was not provided because the plaintiff indicated he was unable to do so without his costs being assessed. The offer was subsequently rejected by the defendants.

Rule 360(1) of the *UCPR* provides that if 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, then 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.

On behalf of the defendants, it was submitted that the plaintiff's offer did not fall within rule 360 of the *UCPR* and that any order for costs should therefore be on the standard basis. It was submitted that the plaintiff had not obtained a judgment which was no less favourable than the offer to settle because the reduction of a mere $100 from the total sought by the plaintiff did not represent a genuine offer to compromise

and the failure of the plaintiff to provide details of the costs meant that the defendants did not receive a proper opportunity to fully consider the matter.

As to the first argument, in *Jones v Millward* [2005] 1 Qd R 498, Holmes J (as she then was), with whose judgment McMurdo P and Jerrard JA agreed, observed that the purpose of the rules, as rule 5(1) *UCPR* explicates, is to "facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense." Her Honour held that an offer to settle within the meaning of rule 360 is one which contains an element of compromise.

In so holding, her Honour referred with approval to New South Wales authorities, in particular, the decision of *Tickell v Trifleska Pty Ltd* (1990) 25 NSWLR 353, where it was held that a purported offer of compromise that the plaintiff would settle for the whole of the amount claimed together with interest was not an offer of compromise within the New South Wales equivalent rule, notwithstanding that the plaintiff had obtained no less favourable judgment than the offer. In that case, Rogers CJ held that the purported offer of compromise was not "a realistic assessment of what, in the circumstances, represented a fair and proper compromise", but rather "yet another formally stated demand for payment designed simply to trigger the entitlement to payment of costs on an indemnity basis."

A similar approach has been taken in Victoria, although I note

that the Victorian rules also have a somewhat different provision, in that there is an additional provision in rule 26.08(8) which is not reflected in the Queensland rules.

In concluding that a proposal which demands nothing less than all the relief sought in a claim plus costs is not in truth an offer to settle, Holmes J in *Jones v Millward* did not go on to consider what degree of compromise was required before an offer was properly able to be described as an offer to settle.

I note, however, that in *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358, Giles J held that a purported offer of compromise which stated that the plaintiff would settle for $1 less than the full claim did not constitute an offer of compromise which would entitle the plaintiff to a costs order at a higher basis. I endorse the comments of Daubney J in *Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd (No 2)* [2010] QSC 365 at 12, where his Honour stated:

> "It is necessary to look at the substance of what is offered in the circumstances of the case to see whether the offer is in truth a compromise. The decision in this regard is one to be made by reference to all the circumstances of the case, not by applying a fixed mathematical formula. In Cape York Airlines an offer to forego $50,000 in relation to a claim for $1,800,000 was not considered to be so trivial as to disqualify the offer from being found to be a genuine offer of compromise. In

addition, the plaintiff's offer involved it forsaking its claim for lost income."

In the present case, counsel for the plaintiff conceded, correctly in my view, that the $100 discount made in the offer in relation to the disposition of the $50,000 paid into Court did not involve the sufficient compromise such that rule 360 would be activated. However, counsel argued that there was an element of compromise with respect to the issue of interest. In effect, the argument was that the plaintiff was entitled to contractual interest at a higher rate and for a longer period than that which arose by way of accretion in respect of the $50,000 paid into Court. The difficulty with that argument is that the plaintiff did not plead an entitlement to contractual interest, contrary to the requirements under the *UCPR*: see rule 150(h).

In those circumstances, I do not consider that indemnity costs should be awarded pursuant to rule 360 *UCPR*, the application of the rule not being triggered by the offer that was made.

The remaining issue concerns the issue that was raised by the plaintiff, but not ultimately pursued, concerning resale at an undervalue. The defendants relied on rules 684(1) and 167 in advancing an argument that, in relation to the undervalue issue, the plaintiff should not have the benefit of costs and that that matter ought to be the subject of a costs order in favour of the defendants.

However, I do not consider that issue in question was of such significance, nor was the conduct involved such as to attract a costs order of the nature argued by the defendants. I note, in particular, that the property was resold some four months after the termination of the contract between the parties. The defendants relied upon a valuation which remained the subject of dispute until a joint valuation report was obtained and provided to the parties in about August 2011. Thereafter, the plaintiff promptly desisted in pursuing that issue. Had the plaintiff continued to ventilate the issue beyond that period, it may well have attracted a costs order of the nature advanced by the defendants.

The orders of the Court will therefore be that the sum of $50,000, plus accretions, be paid to the plaintiff. The plaintiff's costs on the standard basis be paid by the defendants. The counterclaim is dismissed.
