SUPREME COURT OF QUEENSLAND

CITATION:	*Walton Construction (Qld) P/L v Plumber by Trade P/L & Ors (No 2)* [2012] QSC 280
PARTIES:	**WALTON CONSTRUCTION (QLD) PTY LTD ABN 60 100 833 225** (applicant) **v** **PLUMBER BY TRADE PTY LTD AS TRUSTEE FOR THE LESLIE FAMILY TRUST AND FRANJAMEN PTY LTD AS TRUSTEE FOR THE MARTIN FAMILY TRUST TRADING AS PLUMBING BY TRADE ABN 71 253 682 564** (first respondent) and **ADJUDICATE TODAY PTY LTD ABN 39 109 605 021** (second respondent) and **ANDREW BRUCE WALLACE ADJUDICATION REGISTRATION J47895** (third respondent) and **FRANJAMEN PTY LTD AS TRUSTEE FOR THE MARTIN FAMILY TRUST ABN 20 119 364 816** (fourth respondent) and **PLUMBER BY TRADE PTY LTD AS TRUSTEE FOR THE LESLIE FAMLY TRUST ABN 43 869 406 768** (fifth respondent)
FILE NO:	BS2887/12
DIVISION:	Trial
PROCEEDING:	Costs application
DELIVERED ON:	14 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	12 September 2012, written submissions
JUDGE:	Margaret Wilson J
ORDER:	**1. That the first, fourth and fifth respondents pay the applicant's costs of and incidental to the application to be assessed on the standard basis;** **2. That the first, fourth and fifth respondents be granted an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973.**
CATCHWORDS:	

COUNSEL: B E Codd for the applicant
T A Houghton for the first, fourth and fifth respondents

SOLICITORS: DibbsBarker for the applicant
Ramsden Lawyers for the first, fourth and fifth respondents

[1] **MARGARET WILSON J**: The applicant sought a declaration that a payment claim under the *Building and Construction Industry Payments Act* 2004 (*"BCIPA")* and/or the adjudication decision on it were void or invalid for jurisdictional error; in the alternative an order quashing the adjudication decision.

[2] I found that both the payment claim and the adjudication decision were void.

[3] The parties have since agreed on the form of order –

> "1. The payment claim of the First Respondent made to the Applicant dated 21 December 2011 [the **Payment Claim**] is declared void.
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> 2. The adjudication decision of the Third Respondent, registered adjudicator number J47895, delivered 16 February 2012 and the amended decision of the Third Respondent delivered 2 March 2012, adjudication application number 1057877_2025 [the **Adjudication Decision**] is declared void.
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> 3. The amount paid into Court by the Applicant of $208,910.26 (plus accretions thereon) be paid out of Court to the Applicant."

[4] There was short oral argument on costs after the decision was delivered, and the parties have since made further written submissions.

[5] Costs ought to follow the event. The issue is whether those costs should be assessed on the standard basis or the indemnity basis.

[6] On 4 May 2012 the applicant served the following offer on the first, fourth and fifth respondents –

> "TAKE NOTICE that the Applicant offers to settle the Applicant's claim against the First, Fourth and Fifth Respondents on the basis that:
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> 1. The First, Fourth and Fifth Respondents consent to the Court making orders and declarations in the following terms:
>
> (a) A declaration that the adjudication decision of the Third Respondent, registered adjudicator number J47895, delivered 16 February 2012 and the amended decision of the Third Respondent delivered 2 March 2012, adjudication application number 1057877_2025, [the **Adjudication Decision**] purportedly made under the *Building and Construction Industry Payments Act* 2004, is void or ought to be set aside.
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> (b) An injunction to restrain the First, Fourth and Fifth Respondents from requesting an Adjudication Certificate from the Second Respondent under the *Building and*

Construction Industry Payments Act 2004 pursuant to the Adjudication Decision of the Third Respondent.

(c) An injunction to restrain the First, Fourth and Fifth Respondents from applying for judgment in respect to Adjudication Decision under the *Building and Construction Industry Payments Act* 2004.

(d) Each party bears their own costs of and incidental to the proceedings.

2. The applicant pay to the First, Fourth and Fifth Respondents the sum of $10,000.00 which is inclusive of any GST payable on the settlement ('the settlement sum');

This offer, which is made in accordance with part 5 of chapter 9 of *Uniform Civil Procedure Rules* 1999, is open for acceptance for a period of 14 days after the date of its service.

Acceptance of this offer may only be effected by forwarding a written notice of acceptance to the undersigned solicitors for the application.

The applicant will pay the settlement sum within 21 days after receipt of the solicitors for the Applicant of a consent in the form of 1(a), (b), (c) and (d) above signed by the First, Fourth and Fifth Respondents."

[7] The applicant sought costs on the standard basis prior to 4 May 2012, and on the indemnity basis thereafter pursuant to r 360 or alternatively r 703 of the *UCPR.*

[8] Rules 353 and 360 provide –

"**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.

(2) A party may serve more than one offer to settle.

(3) An offer to settle must be in writing and must contain a statement that it is made under this part."

"**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."

[9] This proceeding was commenced by originating application.

[10] Rule 360 applies to an offer to settle made by a plaintiff, and rule 361 applies to an offer to settle made by a defendant. Counsel for the applicant submitted –

> "4. The election of the applicant to commence by way of originating application under rr 8 and 11 was appropriate in the circumstance that there was no material contest of fact between the parties. However, it is difficult to envisage how the applicant could have been criticised if it had commenced by way of claim and statement of claim.
>
> 5. Consequently, there is no proper basis for distinguishing the operation of r 360 on the basis that relief was sought by way of an originating application. Indeed, it is within the power of the Court pursuant to rr 13 and 14 to make orders about the correct procedure which is to [sic] adopted by the parties which would have the effect of vitiating the operation of r 360 in some cases and engaging it in others without clear distinction other than the reference to *'plaintiff'* found in the rule. With respect, that outcome could not be the legislative intent as referred to below in reference to the decision in *Bank Polska*[1].
>
> 6. Ultimately, the only issue procedurally under r 360 is whether a judgment resulted.
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> 7. Schedule 4 of the UCPR defines a judgment relevantly by reference to r 659.
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> 8. Rule 659 defines the term '*judgment*' in two distinct limbs as:
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> (a) final relief in a proceeding started by way of a claim in the form of a money order is the '*giving of a judgment*'; or
>
> (b) '*any other form of final relief*'.
>
> 9. The order of the Court in this proceeding is declaratory and is '*final relief*' as relevantly referred to in Rule 659."

[11] In my view, r 360 is inapplicable in the present case.

[12] Under r 4 and schedule 4 of the *UCPR* "order" includes a judgment, direction, decision or determination of a court, whether final or otherwise. The dictionary in schedule 4 refers to r 659 for the term "judgment". For the purposes of chapter 16 which is headed "Orders", a judgment is given when a Court grants final relief, but only in a proceeding started by claim. In contrast, an order can be made in a proceeding started by application where final relief is not sought.[2]

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1 *Bank Polska Kasa Opieki Spolka Akcyjan v Opara & Anor (No 2)* [2010] QSC 358.

2 See *Civil Procedure Queensland* [r 658.10].

[13] In *Bank Polska Kasa Opieki Spolka Akcyjan v Opara (No 2)* [3] [2010] QSC 358, a proceeding commenced by originating application, in which the applicants were successful in obtaining orders to set aside foreign judgments registered in favour of the applicant, the applicants conceded that rules 360 and 361 were inapplicable, but argued that their position was relevantly equivalent to that of successful plaintiffs and that r 360 indicated the proper approach to the exercise of the Court's discretion. PD McMurdo J did not accept that submission. His Honour said –

> "[4] In my view the Oparas should not be regarded as litigants who were, in substance plaintiffs. It is true that they applied for the orders which were granted by my judgment, which were final orders disposing of the proceedings. However the distinction between plaintiffs and defendants, which appears from a comparison of rules 360 and 361, reflects a policy that a party which has a good cause of action should be allowed a more generous assessment of its costs where it has offered to compromise but has had to litigate. As I see the present cases, the Oparas' position was not analogous to that of plaintiffs. The cause of action (if any) prior to these proceedings was that of the bank and the Oparas have successfully resisted the bank's attempt to pursue it by the registration of its foreign judgments. If indemnity costs are to be awarded, it is appropriate that they be awarded only from the date of service of the offer to settle."

[14] In this proceeding the applicant argued that the adjudication decision was infected by jurisdictional error. It was not pursuing a cause of action which was capable of compromise, except as to costs.

[15] Counsel for the applicant submitted that this proceeding was "an all or nothing type action", and that it had obtained a judgment more favourable than its offer.

[16] I do not accept the submission of counsel for the first, fourth and fifth respondents that the applicant should be denied indemnity costs because it did not raise the jurisdictional issue before the adjudicator. Whether the adjudicator would have proceeded with the determination in the face of a challenge to his jurisdiction is speculative. In any event, the adjudicator could not finally determine his own jurisdiction.

[17] *BCIPA* provides a statutory right to interim payment of progress claims. By s 100 interim payments may be "clawed back" in civil proceedings to determine the parties' ultimate rights. Here the subcontractor sought an interim payment of in excess of $208,000. That amount was paid into Court.

[18] The subcontractor was unlicensed under the *Queensland Building Services Authority Act ("QBSA Act)*, and so it is restricted to recovery of its costs (or the contract price if its costs are greater than the agreed price).[4] It is not presently possible to estimate how much of that amount it might ultimately recover.

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[3] In *Bank Polska Kasa Opieki Spolka Akcyjan v Opara (No 2)* [2010] QSC 358.

[4] *QBSA Act* s 42(4).

[19] To come within r 360 an offer by a plaintiff must involve some degree of compromise, if only as to costs.[5] I acknowledge that here there was an element of compromise – with respect to costs.

[20] The offer included the making of a declaration that the adjudication decision was void or ought to be set aside. It is not contested that the respondent undertook not to convert the decision into a certificate and ultimately a judgment order. It also included the payment of $10,000.

[21] As counsel for the first, fourth and fifth respondents submitted, it is not clear on the face of the offer what the payment of $10,000 was for. On any view the applicant was claiming no more than the relief sought in the application; it was not claiming any amount of money. The subcontractor's rights under s 100 of *BCIPA* and s 42(4) of the *QBSA Act* were not in issue in this proceeding.

[22] In my view where an applicant succeeds in obtaining the declaratory relief sought in its application, an offer to pay a sum of money when none was claimed in the proceeding would not make the offer more favourable than the judgment obtained in the proceeding.

[23] The first, fourth and fifth respondents' refusal of the offer was nevertheless not unreasonable, given the uncertainty about the purpose of the proposed payment of $10,000.

[24] In all the circumstances I have concluded that indemnity costs ought not be awarded, either under r 360 or r 703.

[25] The first, fourth and fifth respondents sought an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act*1973.

[26] Section 4 of the Act provides –

> "***appeal*** includes an order to review, a case stated for the opinion or determination of a superior court on a question of law, a question of law reserved in the form of a special case for the opinion of a superior court, a motion for a new trial and any other proceeding in the nature of an appeal."
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> "***court*** includes any board, other body or person from whose decision there is an appeal to a superior court on a question of law or which may state a case for the opinion or determination of a superior court on a question of law or reserve any question of law in the form of a special case for the opinion of a superior court."

[27] The legislation is remedial and so to be given a beneficial interpretation. The definition of "appeal" is inclusive, and it has been held to include proceedings for the issue of certiorari.[6] In *JB Geraghty & ors v Dairy Industry Tribunal*[7] I held that an application for judicial review of a decision of the Dairy Industry Tribunal on the grounds of error of law and breach of the rules of natural justice was a proceeding in respect of which a certificate under s 15 might be granted.

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5 *Jones v Millward* [2005] QCA 76.

6 *R v Webster, ex parte Trueline Aluminium Pty Ltd* [1987] 1 QdR 45; *R v McKay ex parte Cassaniti* [1993] 2 Qd R 95.

7 [2000] QSC 144.

[28] I consider that the adjudicator's decision was a "decision of a court" within s 15, and that the application to have it declared void for jurisdictional error was an "appeal" against that decision within the meaning of s 15.

[29] The first, fourth and fifth respondents should be granted an indemnity certificate in respect of the application.

[30] I order –

(a) that the first, fourth and fifth respondents pay the applicant's costs of and incidental to the application to be assessed on the standard basis;

(b) that the first, fourth and fifth respondents be granted an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973.