SUPREME COURT OF QUEENSLAND

CITATION:	*Mansi v O'Connor & Ors* [2012] QSC 374
PARTIES:	**GIOVANNO ASTRUO MANSI** (Plaintiff) **v** **JAMES EDWARD O'CONNOR** (First Defendant) **QBE INSURANCE (AUSTRALIA) LIMITED** **(ABN 78 003 191 035)** (Second Defendant) **THE NOMINAL DEFENDANT** (Third Defendant) **PETESAGI PTY LTD (ACN 077 602 790)** (Fourth Defendant) **SABDOKE PTY LTD (ACN 010 290 525)** (Fifth Defendant) **SUNCORP METWAY INSURANCE LIMITED** **(ACN 075 695 966)** (Sixth Defendant) **SHANE ELLIS** (Seventh Defendant) **GRACHELLE TRANSPORT PTY LTD** **(ACN 102 485 272)** (Eighth Defendant) **ASHMA PTY LTD (ACN 112 666 001)** (Ninth Defendant) **ALLIANZ AUSTRALIA INSURANCE LIMITED** **(ABN 15 000 122 850)** (Tenth Defendant)
FILE NO/S:	BS No. 7262 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane

DELIVERED ON: 27 November 2012

DELIVERED AT: Brisbane

HEARING DATE: 2 October
Written submissions received on 9 October 2012

JUDGE: Ann Lyons J

ORDER:

1. **That judgment be entered for the Plaintiff against the Second Defendant in the sum of $93,757.51;**

2. **That the Second Defendant pay the Plaintiff's costs of and incidental to the proceeding to be assessed up to and including 31 October 2010 on the District Court Scale and thereafter until 22 May 2012 on the Magistrates Court Scale;**

3. **That the Second Defendant pay the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Defendants' costs of and incidental to the proceeding to be assessed on the standard basis of assessment up to and including 22 May 2012;**

4. **That the Plaintiff pay all Defendants' costs of and incidental to the proceeding on and from 23 May 2012 to be assessed on the indemnity basis of assessment; and**

5. **That the assessed costs ordered to be paid by the Plaintiff be set off against the judgment sum and assessed costs ordered to be paid to the Plaintiff by the Second defendant, prior to any payment by the Second Defendant to the Plaintiff of, or execution on, the balance after such set off.**

CATCHWORDS: PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – OTHER CASES – Where Plaintiff and Defendants made Mandatory Final Offers pursuant to the *Motor Accident Insurance Act* 1994 (Qld) – Where Defendants made an offer to settle a week before trial which the Plaintiff rejected – whether the defendant was unreasonable in not accepting the offer – whether costs should be awarded on an indemnity basis

PROCEDURE – COSTS – SCALE OF COSTS – DISCRETION TO VARY SCALE – whether costs should be awarded on the Magistrates Court Scale or the Supreme Court Scale pursuant to the *Uniform Civil Procedure Rules* 1999 (Qld) – whether the circumstances justify the exercise of discretion to award costs on the Supreme Court Scale

Motor Accident Insurance Act 1994 (Qld), s 45(3), s 51C(10)

Uniform Civil Procedure Rules 1999 (Qld), r 698(2)

Besterman v British Motor Cab Company Ltd [1914] 3 KB 181
Calderbank v Calderbank (1975) 3 All ER 333
Carr & Anor v Anderson (No.2) (2001) QDC 305
Cutts v Head (1984) 1 All ER 597
Howell v Nominal Defendant (1962) 108 CLR 552
Lawes v Nominal Defendant [2007] QSC 103
Perfect v MacDonald & Anor [2012] QSC 11
Sanderson v Blyth Theatre Co (1903) 2 KB 533
Smyth v McLeod & Ors [2004] QSC 43
Smyth v McLead & Ors [2004] QSC 69
Tickell v Trifleska Pty Ltd (1990) 25 NSWLR 353

Dal Pont, GE *Law of costs (2nd ed)* Lexis Nexis Butterworths Australia, Chatswood, 2009

COUNSEL: S J Given for the Plaintiff
T Mathews with S J Williams for the Defendants

SOLICITORS: Sinnamon Lawyers for the Plaintiff
Jensen McConaghy for the Defendants

ANN LYONS J:

[1] On 2 October 2012 I delivered my reasons in relation to the plaintiff's claim for personal injuries as a result of a motor vehicle accident. I found that the driver of First Defendant's vehicle had been negligent in his driving of the QBE (Second Defendant) insured Readymix truck and that the plaintiff had been injured when he fell from his motorcycle after he lost control of the motorcycle as it slid in the concrete slurry which was discharged from the truck. He suffered a fracture to his right wrist. Damages were assessed at $93,757.51.

[2] The issue of costs remains. Counsel provided written submissions on costs on 9 October 2012.

Mandatory Final Offers and Calderbank Offers

[3] Pursuant to s 51C(10) of the *Motor Accident Insurance Act* 1994 (Qld) ("MAIA"), the Court must (where relevant) have regard to any Mandatory Final Offer ("MFO") made in the course of the pre-proceeding procedures in making a decision about costs. The affidavit of Paul Birkett sworn 2 October 2012 indicates that the following MFO's were exchanged at the compulsory conference on 10 December 2010:

(a) Plaintiff - $240,000.00 plus costs;

(b) First Defendant, Second Defendant and Fourth Defendant - $Nil;

(c) Third Defendant - $Nil;

(d) Fifth and Sixth Defendant - $Nil; and

(e) Seventh, Eighth, Ninth and Tenth Defendants - $Nil.

[4] On Tuesday 22 May 2012, a week before the commencement of the trial, the Defendants offered to settle the Plaintiff's claim in the sum of $400,000.00 plus costs.[1] The letter expressly stated that should the offer not be accepted then it would be brought to the attention of the Court on the question of costs in accordance with the principles enunciated in *Calderbank v Calderbank*.[2] The offer was open for acceptance until 4.00 pm on Wednesday 23 May 2012 and was rejected on that day.

[5] The Plaintiff was made bankrupt on presentation of a Debtor's Petition on 16 February 2012.

[6] On 23 May 2012 the Plaintiff's bankruptcy was disclosed in a forensic accountant's report by Vincents dated 23 May 2012.

The Plaintiff's submissions

[7] Counsel for the Plaintiff submits that the Second Defendant, as Licensed Insurer of the First Defendant, is wholly responsible for the Plaintiff's claim for personal injuries arising out of this accident. In the ordinary course therefore, the order for the plaintiff's costs should follow the event. Counsel for the plaintiff submits that given the denials of liability by the Second and Third Defendants[3] and the investigations that had been made, it was necessary and prudent for the Plaintiff to join all potential Defendants. All Defendants continued to maintain denials of liability[4] and had single representation at the Trial. In these circumstances it is argued that it is appropriate for a '*Sanderson* order'[5] in relation to costs; that is, an order requiring the Second Defendant to pay the costs of the Third – Tenth Defendants.[6]

[8] Whilst counsel argued that there is no evidence before the Court of any monetary offers that have been made by the Defendants pursuant to the MAIA or the UCPR which could have statutory costs consequences, I note the affidavit of Paul Birkett setting out the Plaintiff's MFO of $240,000 and the offer of 22 May 2012 to settle for $400,000 plus costs.

[9] Counsel fro the plaintiff argues that there are extensive regimes in both the MAIA and the UCPR for costs orders when a judgment exceeds a statutory offer but the Defendants have not availed themselves of these procedures which provide appropriate remedies for non-acceptance of an offer and, rather, seek to rely upon a now antiquated practice. Counsel relies in this regard on the decision in *Cutts v Head*[7] that a Calderbank-styled offer could not be used as a substitute for a Payment into Court. Lord Justice Oliver considered that in a simple monetary claim, he would not be disposed to treat a Calderbank offer as carrying the same consequences as a Payment into Court. Judge Robertson was of the same view in

---

1 Exhibit PRB2 to the Affidavit of P R Birkett sworn 2 October 2012.
2 (1975) 3 All ER 333.
3 See Notices of Intention to Defend, Court File Documents 2 and 3.
4 See Notices of Intention to Defend, Court File Documents 24, 25, 26 and 34.
5 *Sanderson v Blythe Theatre Co* (1903) 2 KB 533.
6 As in the two-vehicle case of *Smyth v McLeod & Ors* [2004] QSC 43; and the *Sanderson* costs order in *Smyth v McLeod & Ors* [2004] QSC 69 at paras [5]-[7] and [8.3].
7 (1984) 1 All ER 597.

Carr & Anor v Anderson (No.2)[8] and denied a Defendant indemnity costs where an offer was made which did not qualify as an Offer to Settle under the UCPR.

[10] Accordingly, it is argued that little if any weight should be given to the 22 May 2012 Offer in denying the Plaintiff his right to the usual order as to costs.

[11] Counsel argues that the orders should be:

a) Judgment for the Plaintiff against the Second Defendant for the sum of $93,757.51;

b) The Second Defendant pay the Plaintiff's costs of and incidental to the action including reserved costs to be assessed on a standard basis;

c) The Second Defendant pay the Third – Tenth Defendants' costs of and incidental to the action to be assessed on a standard basis.

The Defendants' submissions

[12] Counsel for the Defendants argues that in the circumstances of this case the Plaintiff should pay the costs of the Defendants because there were several obstacles of fact and law that the Plaintiff needed to surmount to establish liability and quantum. Counsel argues that the offer of compromise made by the Defendants' was realistic and timely in proximity to the trial and the subsequent disclosure of the Plaintiff's earlier bankruptcy.

[13] It is argued that, in the circumstances, the Plaintiff cannot demonstrate that his decision to not accept the offer was not unreasonable or imprudent and, accordingly, he should bear the burden of costs subsequent thereto on the indemnity basis of assessment.

[14] Counsel also argues that a further factor warranting the payment of costs on an indemnity basis is the circumstances pertaining to the Plaintiff's bankruptcy, the disclosure of same in breach of the Plaintiff's disclosure obligations, the timing of that disclosure, and the true effect of potentially depriving successful Defendants of a means of satisfying any costs award given the number of Defendants to the action and the likelihood the majority of those Defendants would escape an adverse finding on liability.

[15] Counsel also argues that there was no prospect of the Plaintiff succeeding against the Nominal Defendant given his case that all possible Readymix trucks that might have caused the discharge were before the Court and the High Court authority of *Howell v Nominal Defendant*[9] was binding on this Court. In addition, as the Plaintiff identified the offending truck as a six-wheeler, a good size truck and not one of the small trucks the Fifth and Sixth Defendants' and Eighth and Tenth Defendants' trucks could not have been liable.

---

8 (2001) QDC 305 at paras [3]-[6].

9 (1962) 108 CLR 552.

[16] It is also argued that there is not a sufficient basis for the ordering of either a '*Bullock* Order'[10] or *Sanderson* Order.

[17] Counsel submits that the proceeding was commenced in this Court in 2009 against the First, Second and Third Defendants only and claimed damages of $1.6 million at a time when the jurisdiction of the District Court was $250,000. Counsel argues that the Plaintiff's MFO on 12 December 2010 indicated a truer reflection of where his legal advisers believed a quantum assessment would fall. He then joined the Fourth to Tenth Defendants by an Amended Claim and Statement of Claim seeking $555,000 in damages, filed on 16 December 2010.

[18] Counsel also argues that there was:

> "no warrant for the Plaintiff to have continued to sue the Defendants in the Supreme Court with the attendant increase in costs in so doing after the compulsory conference, and he ought to have remitted the proceeding to the Magistrates Court. As Section 98 of the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* ("CCJRMA") amended section 2 of the *Magistrates Courts Act 1921* by increasing the civil jurisdictional limit of the Magistrates Court to $150,000.00 effective on and from 1 November 2010."

[19] Counsel for the Defendants also submits that, in the circumstances, UCPR r 698(2) has application and unless the Plaintiff establishes that a different order is appropriate that rule has the mandatory effect that any costs order in favour of the Plaintiff against the Second Defendant should be on the District Court Scale up to 31 October 2010 and, from and after 1 November 2010, on the Magistrates Court Scale. Reliance is placed on the obiter comments of McMeekin J in *Perfect v MacDonald & Anor*,[11] where his Honour records the process he intended to adopt to proceedings being commenced and continued to be prosecuted in a jurisdiction where standard basis costs are significantly higher than a Court with jurisdiction to hear and determine a claim.

[20] Counsel also points to the plaintiff's bankruptcy and argues that s 45(3) of the MAIA imposes a mandatory obligation upon a claimant who becomes aware of a "significant change in the claimant's medical condition, or in other circumstances, relevant to the extent of the claimant's disabilities or financial loss" before the claim is resolved to inform the insurer of that change. Counsel submits that the Plaintiff's bankruptcy constituted a significant change in "other circumstances" "relevant to the extent of" his "financial loss".

Consideration

[21] Given the factual circumstances of this case, I consider that it was appropriate for the plaintiff to join all the Defendants in this action. All the Defendants denied liability. There were factual issues as to whether all the relevant Defendants were before the court and as to who was the responsible defendant. As Vaughan Williams LJ indicated in *Besterman v British Motor Cab Company Ltd*,[12] if the facts are such that it is reasonable to be in a "state of uncertainty" as to who is the responsible

---

10 *Bullock v London General Omnibus Company* [1907] 1 KB 264.

11 [2012] QSC 11.

12 [1914] 3 KB 181.

defendant then the reasonable costs of the action which was taken against the other defendants should be borne by "the man who is to blame". Whilst it was ultimately held that all possible Defendants were before the Court that was by no means certain before the commencement of the trial.

[22] I also note that all the Defendants were represented by the same Counsel at trial. In my view a Sanderson order is the appropriate order up to 22 May 2012.

[23] However, the real issue in this consideration as to who should have to bear the burden of costs is that the plaintiff rejected a very fair offer as to costs a week before trial. As Rogers CJ stated in *Tickell v Trifleska Pty Ltd*:[13]

> "It is the primary aim of any judicial system to attempt to bring the parties to a point where, with fairness to themselves, they are able to dispose of the dispute between them by compromise."

[24] I consider that the offer of 22 May 2012, a week before trial, was indeed an appropriate offer and a realistic offer give the extent of the plaintiff's injuries, the lack of contemporaneous evidence in relation to his alleged back injury from the accident, his pre-existing injuries and the true extent of his future economic loss. I consider that the offer was in clear terms and was in fact a "genuine attempt at compromise." In my view the Plaintiff has not shown that the rejection of that offer was not unreasonable.

[25] It was not, however, a Payment into Court in accordance with the rules. It is, however, clearly a matter which I can take into account. In his text on the *Law of Costs* Dal Pont states:[14]

> "[13.44] Although Calderbank offers originated in matrimonial property proceedings, there has developed a body of practice recognising the ability to admit to correspondence expressed to be 'without prejudice except as to costs' in all forms of proceeding. The availability of the procedure for offers of compromise prescribed by court rules (or of a payment in procedure) does not displace the utility of a Calderbank offer (although the availability of an alternative procedure may go to the *weight* accorded to the offer); the rules do not prescribe a code for settlement offers. As explained by Hayne JA in *Grbavac v Hart*:
>
> > [I]t is open to a judge exercising the discretion about the disposition of the costs of a proceedings to have regard not only to formal offers that may have been made pursuant to Rules of Court but, in appropriate circumstances, to informal offers of compromise that may have been made."

---

13 (1990) 25 NSWLR 353 at 354.

14 Dal Pont, GE *Law of Costs (2nd ed.)* Lexis Nexis Butterworths Australia, Chatswood, 2009 at pp 392-393 (references omitted).

[26] I also consider that I should also take into account the MFO of 12 November 2010. In *Lawes v Nominal Defendant*,[15] Byrne J referred to the costs regime under the MAIA and the relevant considerations for costs in circumstances where judgment sum exceeds $50,000, as follows:

> "That regime, however, does not apply where, as here, the judgment sum exceeds $50,000. In this event, the Act does not stipulate in terms for an award of indemnity costs where the plaintiff is awarded more by judgment than his mandatory final offer showed he was willing to accept. Instead, in those circumstances (see *Monement v Faux* [2006] 2 Qd R 392, 397 [27]) by s.51C(10) of the Act,
>
> > "The Court must (where relevant) have regard to the mandatory final offers in making a decision about costs."
>
> This is not the right to indemnity costs created by s.55F. Nor is it equivalent to the presumptive entitlement arising from successful compliance with the Offer to Settle scheme. Rather, potentially, a mandatory final offer is, by operation of s.51C(10), a significant, though not decisive, consideration in the exercise of a discretion to award costs on an indemnity basis."

[27] I concur with his Honours view that s 51C(10) operated in much the same way as would an offer not made under the UCPR but by way of a '*Cutts v Head'* or '*Calderbank*' offer, which does not have a mandatory effect of requiring an order for indemnity costs but, rather, enlivens the discretion in the Court to order costs on that basis.

[28] I also accept that this was not a claim that should have proceeded in the Supreme Court, particularly after the Plaintiff's MFO dated 12 November 2010 was a figure of $250,000. I accept that from 1 November 2010 the amount awarded to the Plaintiff meant that the claim was within the jurisdiction of the Magistrates Court.

[29] Having taken all of those factors into account I consider that there should be cost consequences which flow from the Plaintiff's rejection of the Defendants' offer of 22 May 2012. I consider that the appropriate costs orders are as follows:

1. the Second Defendant pay the Plaintiff's costs of and incidental to the proceeding to be assessed up to and including 31 October 2010 on the District Court Scale and thereafter until 22 May 2012 on the Magistrates Court Scale;

2. the Second Defendant pay the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Defendants' costs of and incidental to the proceeding to be assessed on the standard basis of assessment up to and including 22 May 2012;

3. the Plaintiff pay all Defendants' costs of and incidental to the proceeding on and from 23 May 2012 to be assessed on the indemnity basis of assessment.

[30] Counsel for the Defendants also argues that the assessed costs ordered to be paid by the Plaintiff to the Defendants be, in the first instance, set-off against the judgment

---

15 [2007] QSC 103 at p 5.

sum and assessed costs ordered to be paid by the Second Defendant to the Plaintiff. I am satisfied that such an order is appropriate.

[31] The Defendants seek an order that execution on the balance judgment sum and costs be stayed in the event of an Appeal or Cross-Appeal being filed within the time limited by the Rules and that such a stay continue until the final determination of such Appeal or earlier order. However I am not currently satisfied that I have sufficient information in this regard and the Plaintiff has not been heard in relation to this aspect of the defendant's submission. I do not therefore consider that there can be an order in those terms at this point in time.