SUPREME COURT OF QUEENSLAND

CITATION:	*State of Queensland v Hayes (No 2)* [2013] QSC 80
PARTIES:	**STATE OF QUEENSLAND** (applicant) **v** **STEVEN MICHAEL HAYES** (respondent)
FILE NO/S:	2970/08
DIVISION:	Trial
PROCEEDING:	Costs Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	27 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers The applicant's submissions 15 February 2013.
JUDGE:	Philippides J
ORDER:	**The respondent pay the applicant's costs of the application for forfeiture and the application for exclusion (including any reserved costs) on the standard basis**
CATCHWORDS:	COSTS – whether usual order as to costs that costs follow event should be made – Calderbank offer – whether indemnity costs should be ordered in part
COUNSEL:	JB Rolls for the applicant S Nguyen for the respondent
SOLICITORS:	Office of the Director of Public Prosecutions for the applicant Southside Lawyers for the respondent

Background

[1] On 8 February 2013, reasons for judgment were delivered in respect of two applications that were before the court; an application for forfeiture filed on 12 May 2008 pursuant to the *Criminal Proceeds Confiscation Act* 2002 (Qld) ("the Act") brought by the State of Queensland (the applicant) and an application for exclusion filed on 30 June 2008 brought by the respondent, Steven Michael Hayes. In respect of the forfeiture application, it was ordered pursuant to s 56(1) and s 58(1)(a) of the Act, that the sum of $104,080 cash be forfeited to the State of Queensland and together with any accrued interest thereon. The respondent's application for exclusion was dismissed.

[2] It should be noted that, by the initial forfeiture application, forfeiture was sought in respect of all of the following property the subject of a restraining order made by Martin J, namely the sum of $104,080 cash seized by the Queensland Police Service, interest in Real Property located at 5 Jonath Court, Edens Landing and a 1989 Nissan 180 SX Coupe. Subsequently, on 30 November 2011, an order was made amending the restraining order made by Martin J so as to delete all property other than the $104,080 cash seized by police from restraint and an amended application for forfeiture was filed on the same day. Hence the forfeiture order made did not extend to all of the property initially restrained.

[3] The parties were invited to provide written submissions as to costs. The applicant has availed itself of that opportunity but the respondent's legal representatives have indicated that no submissions will be provided.

The applicant's costs application

[4] The applicant now applies for a costs order that the respondent pay the applicant's costs of the application for forfeiture and of the application for exclusion on the standard basis up until 21 May 2010 and thereafter on the indemnity basis.

[5] The basis on which that costs order was sought is that the respondent failed to accept offers of compromise of the proceedings and obtained an order no less favourable than the offer that the applicant made by letter of 28 April 2010. It should be noted that no offer was made by the applicant pursuant to Part 5 of Chapter 9 of the *UCPR*. Instead, in seeking indemnity costs the applicant relied upon the offer of 28 April 2010 and subsequent written offers as constituting "Calderbank offers." It was contended that it was not necessary to adduce evidence as to why the procedure provided under rules to make an order for compromise was not availed of: *Jones v Bradley (No 2)* [2003] NSWCA 258 at [12].

[6] The applicant accepted that there was nothing prior to 28 April 2010 to alter the discretion which would ordinarily be exercised in the applicant's favour for costs to be ordered to be paid on the standard basis of the proceedings in respect of both its successful application for forfeiture and its successful defence of the respondent's application for exclusion. But, it was submitted that thereafter the evidence indicated that a different result should apply. In that regard reliance was placed on the affidavit of Hanh Ayoko sworn 15 February 2013.

The relevant principles

[7] Generally, costs of a proceeding are at the discretion of the court but follow the event: r 681 *UCPR*. The discretion conferred upon the court in awarding costs is a wide one but it must be exercised judicially and not by reference to irrelevant considerations: see *Latoudis v Casey* (1990) 170 CLR 534.

[8] It may be accepted that the making of a Calderbank offer is one circumstance in which the court might exercise its discretion to make an order different from the "usual" order that costs follow the event on the standard basis. As the authorities explain, there is both a public policy and a private interest in encouraging offers of compromise so as to settle legal proceedings: *Cutts v Head* [1984] 1 All ER 579; *South Eastern Sydney Area Health Service v King* [2006] NSWCA 2. In *Leichhardt Municipal Council v Green* [2004] NSWCA 341, Santow JA at [14] noted:

> "It can be seen from these cases that the practice of Calderbank letters is allowed because it is thought to facilitate the public policy objective of providing an incentive for the disputants to end their litigation as soon as possible. Furthermore, however, it can be seen as also influenced by the related public policy of discouraging wasteful and unreasonable behaviour by litigants."

[9] As to the private interest which underpins the public policy objectives, Fox LJ observed in *Cutts v Head* [1984] 1 All ER 597 at 612:

> "If a party is exposed to a risk as to costs if a reasonable offer is refused, he is more rather than less likely to accept the terms and put an end to the litigation. On the other hand, if he can refuse reasonable offers with no additional risk as to costs, it is more rather than less likely to encourage mere stubborn resistance."

[10] In *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435 the Victorian Court of Appeal observed:

> "[21] In *Grbavac v Hart*, Hayne JA cited with approval what the New South Wales Court of Appeal had said in *Maitland Hospital v Fisher (No 2)* about the policy rationale underlying the availability of special orders for costs where offers of compromise are rejected. Like his Honour, we think that what was there said is equally relevant to the exercise of the costs discretion where a Calderbank offer has been made. The policy objectives were said to be:
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> > '(1) To encourage the saving of private costs and the avoidance of the inherent risks, delays and uncertainties of litigation by promoting early offers of compromise by defendants which amount to a realistic assessment of the plaintiff's real claim which can be placed before its opponent without risk that its 'bottom line' will be revealed to the court;
> >
> > (2) To save the public costs which are necessarily incurred in litigation which events demonstrate to have been unnecessary, having regard to an earlier (and, as found, reasonable) offer of compromise made by a plaintiff to a defendant; and
> >
> > (3) To indemnify the plaintiff who has made the offer of compromise, later found to have been reasonable, against the costs thereafter incurred. This is deemed appropriate because, from the time of the rejection or deemed rejection of the compromise offer, notionally the real cause and occasion of the litigation is the attitude adopted by the defendant which has rejected the compromise. In such circumstances that party should ordinarily bear the costs of litigation.'
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> [22] At the same time, as Redlich, J said in *Aljade*, there are other competing objectives of equal importance.
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> > 'Potential litigants should not be discouraged from bringing their disputes to the Courts. It is such considerations which underlie the general rule that an

> order for special costs should only be made in special circumstances." (footnotes omitted).

[11] The fact that a Calderbank offer to settle is not accepted and the offeree ends up worse off than if the offer had been accepted is a matter which the court may have regard to in deciding whether to exercise the costs discretion to depart from the usual order, but it does not automatically bring a different order as to costs: see *SMEC Testing Pty Ltd v Campbelltown City Council* [2000] NSWCA 323 at [37] per Giles JA; *Jones v Bradley (No 2)* [2003] NSWCA 258 at [8]-[9]. Ultimately, the court is required to determine whether the offeree's failure to accept the offer warrants departure from the ordinary rule as to costs having regard to all the circumstances of the case.

[12] In considering whether the discretion ought to be exercised other than in the usual manner, regard will be had as to whether the offer made must be shown to be a genuine one: *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [21]-[24],[36]. Whether or not an offer is viewed as genuine depends on the circumstances of the case. It is the task of the court to consider, "whether the particular offer in the circumstances represented a genuine attempt to reach a negotiated settlement, rather than merely, trigger any costs sanctions": see *Leichardt Municipal Council v Green* [2004] NSWCA 341 at [39] per Santow JA.

[13] Further, the offeree ought to be provided with an appropriate opportunity to consider and deal with the offer: *Elite Protective Personnel v Salmon* [2007] NSWCA 322 at [99].

[14] It will be relevant to consider whether it can be shown that the rejection of the offer was unreasonable in the circumstances of the case. In that regard, it was observed in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435 that the competing considerations which the court has regard to could

> "[23] … be sufficiently accommodated by applying a test of (un)reasonableness. The critical question is whether the rejection of the offer was unreasonable in the circumstances. We see no justification for a more stringent test such as 'manifestly' or 'plainly' unreasonable.
>
> [24] Of course, deciding whether conduct is 'reasonable' or 'unreasonable' will always involve matters of judgment and impression. These are questions about which different judges might properly arrive at different conclusions. As Gleeson CJ said recently, 'unreasonableness is a protean concept'. But a test of reasonableness is, we think, entirely appropriate to the exercise of a discretion such as this." (footnotes omitted).

[15] In *Hazeldene's* case the court considered the factors relevant to assessing reasonableness:

> "[25] The discretion with respect to costs must, like every other discretion, be exercised taking into account all relevant considerations and ignoring all irrelevant considerations. It is neither possible nor desirable to give an exhaustive list of relevant circumstances. At the same time, a court considering a submission

> that the rejection of a Calderbank offer was unreasonable should ordinarily have regard at least to the following matters:
> (a) the stage of the proceeding at which the offer was received;
> (b) the time allowed to the offeree to consider the offer;
> (c) the extent of the compromise offered;
> (d) the offeree's prospects of success, assessed as at the date of the offer;
> (e) the clarity with which the terms of the offer were expressed;
> (f) whether the offer foreshadowed an application for an indemnity costs in the event of the offeree's rejecting it." (footnotes omitted).

[16] The prospect of success is a relevant consideration to the costs determination. Additionally, in *Pirrotta v Citibank Limited* (1998) 72 SASR 259 Debelle J observed at [27]:

> "… the writing of a Calderbank letter should be one of the factors, albeit a significant factor, to be weighed by a court when considering whether to order indemnity costs. I do not think that the complexity of litigation standing alone should necessarily preclude the operation of the rule. The rule is designed to promote settlement of both complex and straightforward litigation and the court will have regard to all relevant circumstances in determining whether the penalty rule as to costs should apply."

[17] In *Elite Protective Personnel v Salmon* [2007] NSWCA 322, Basten JA observed:

> "[147] Greater sympathy may be accorded a defendant who receives an offer early in proeeedings where there has been no reasonable opportunity for it to assess its questions of liability or its likely exposure in damages. Such matters must be assessed on a case by case basis. Usually litigation will not be the first that the defendant hears of the claim. However, a defendant which receives an offer of settlement in circumstances where it reasonably requires more time to consider its position would no doubt be advised to respond to that effect and, if necessary, make a counter-offer in due course."

The applicant's submissions

[18] The applicant submitted that in effect six offers were made to the respondent by the State to compromise the totality of the litigation. These offers were:

1. an offer made on 28 April 2010 to forfeit only the money seized, being $104,080, with each party bearing their own costs of the litigation, which was open until 21 May 2010.
2. an offer on 21 May 2010 which repeated the offer of 28 April 2010 and extended the offer to 4 June 2010.
3. a further offer on 23 July 2010 which repeated the offer of 28 April 2010 and extended the offer to 6 August 2010.
4. an offer made on 21 February 2011 to forfeit $94,080 (with a release of the remaining $10,000 to the respondent) with each party bearing their own costs of the proceedings, open until 4 March 2011.

5. an offer made on 8 April 2011, to forfeit $84,080 (with $20,000 being released to the respondent) with each party bearing their own costs, open until 21 April 2011.

6. an offer made on 31 October 2012 which repeated the offer of 8 April 2011 and remained open until 2 November 2012.

[19] It was said that in respect of the initial offers, the applicant's case was set out in some considerable detail with the applicant identifying flaws in the respondent's case. It was submitted that the failure to accept these offers and, in particular the first of these offers, constituted conduct by the respondent which was unreasonable and shows "stubborn resistance".

[20] It was said that there was no meaningful response to any of the applicant's offers. By letter dated 10 May 2010, the respondent's legal representative, Mr Nguyen, indicated he would be seeking instruction in respect of the letter of 28 April 2010. After the letter of 21 May 2010 was forwarded to the respondent's new lawyers, Southside Lawyers, they indicated by letter dated 19 July 2010 that the respondent sought the return of all the property restrained. Thereafter, there was no active response to the further offers to settle.

[21] I note that the offer of 28 April 2010 sought forfeiture of the cash of $104,080 but released the respondent's interest in the Edens Landing property and in the restrained motor vehicle and provided for each party to bear their own costs. It was submitted that, while the offer of 28 April 2010 was made at a relatively early stage in the proceedings, it was made after the grounds for exclusion had been articulated by the respondent and the applicant had an opportunity to consider those grounds for exclusion and gather evidence in response. At that stage, the parties were fully informed as to the contents of their respective cases, so that a realistic assessment of the prospects of each application could then be made. It was submitted that as the offer allowed the respondent from 28 April 2010 until 21 May 2010 to consider the offer there was ample time given to consider the issues that the applicant raised in its correspondence.

[22] It was further submitted that the offer of 28 April 2010 was a genuine offer of compromise, offering "not an insubstantial saving having regard to the stage at which the litigation had reached" (the matter not had not, as at that time, been set down for trial).

[23] The applicant's prospects of success, it was said, were more than reasonable having regard to what was then known by the parties at the time the offer was made. The applicant always had a prima facie case to obtain an order for forfeiture. The only issue is whether or not the respondent was able to prove that the respondent would be successful in the prosecution of his application for exclusion in demonstrating that the property was not "illegally acquired property". It was submitted that the material in support of exclusion disclosed significant inconsistencies, which the respondent, as his evidence ultimately demonstrated, could not adequately explain. The respondent ought to have known this, but instead caused the applicant to incur substantial expense in prosecuting this action to trial.

[24] It was contended that the terms of the offers were clearly expressed, as were the analyses of the applicant's and the respondent's respective cases outlined in the offers. The correspondence containing the offers was sent to the solicitors for the

respondent. Each offer was clearly marked, "without prejudice, save as to costs" and the effect of that notation ought to have been apparent to the respondent, upon obtaining advice.

[25] It was submitted that the respondent's conduct in not accepting the offers was unreasonable. But the thrust of the submission was that the failure to accept the offer of 28 April 2010 was such as to warrant the order for indemnity costs sought as from 21 May 2010. It was thus contended that the respondent should be ordered to pay the applicant's indemnity costs in respect of the application for forfeiture and the application for exclusion after 21 May 2010, with the respondent paying the applicant's costs on the standard basis before that date.

Conclusion

[26] The applicant contended in the letter of offer of 28 April 2010 that the respondent would not succeed in excluding the land from the forfeiture order because the respondent had no interest in the land. That contention however had consequences for the applicant's claim that the land was liable to be forfeited. And ultimately the applicant's claim for forfeiture in respect of the land was abandoned. As for the motor vehicle, the applicant contended in the letter that the respondent would not be able to show payment from legitimate means (or that the vehicle belonged to Coombes, as the respondent had later alleged), such that the motor vehicle should be excluded. However, if the respondent was not the owner of the vehicle, as he contended, this also had implications for the forfeiture order sought. And in fact the applicant also abandoned that claim in its amended application.

[27] Both items were excluded from the amended application presumably because the applicant did not ultimately consider it could sustain a case for forfeiture in respect of the land or motor vehicle. In these circumstances, the failure to accept the offer of 28 April 2010 which required the respondent to abandon any claim to any part of the only remaining item, ie the sum of $104,080 (albeit on the basis that each party bear its own costs), does not strike me as unreasonable. The only concession in effect being made by way of compromise was in terms of the applicant abandoning any claims for its costs.

[28] In those circumstances, I do not consider that an order for indemnity costs after 21 May 2010 is warranted.

[29] I note that the offer of 21 February 2011 allowed for a release of $10,000 of the sum of $104,080. The offers of 8 April 2011 and 31 October 2012 each provided for a release of $20,000 to the respondent of the restrained $104,080. None of the offers indicated that indemnity costs would be sought in the event that the offer was not accepted and the respondent failed to do better than the offer. Rather the letters indicated that the offers were made without prejudice as to costs. And the letter of 8 April 2011 also stated that the applicant would seek its costs.

[30] In the circumstances, and bearing in mind that it was only on the eve of trial that the applicant amended its application to exclude any claim for forfeiture of the land and motor vehicle restrained by the order of Martin J (which suggests an acknowledgement that these claims could not be sustained) and that no notice was given in any event that indemnity costs would be sought, I do not consider that there should be an exercise of the court's costs discretion against the respondent so as to

order that costs on the indemnity basis be paid for any period following any of the offers made.

[31] Accordingly, the costs order that I consider should be made is the usual order where costs follow the event, that is, that the respondent pay the applicant's costs of the application for forfeiture and the application for exclusion (including any reserved costs) on the standard basis.