SUPREME COURT OF QUEENSLAND

CITATION:	*Mango Boulevard Pty Ltd v Spencer & Ors (No 3)* [2013] QSC 94
PARTIES:	**MANGO BOULEVARD PTY LTD** **ACN 101 544 601** (Plaintiff) v **RICHARD WILLIAM SPENCER** (First Defendant) and **SILVANA PEROVICH** (Second Defendant) and **KINSELLA HEIGHTS DEVELOPMENTS PTY LTD** **ACN 100 373 368** (Third Defendant) and **MIO ART PTY LTD** **ACN 010 101 875** (Fourth Defendant) and **ROBERT WILLIAM WHITTON, AS TRUSTEES OF THE PROPERTY OF RICHARD WILLIAM SPENCER** (Fifth Defendant) and **ROBERT WILLIAM WHITTON, AS TRUSTEES OF THE PROPERTY OF SILVANA PEROVICH** (Sixth Defendant)
FILE NO/S:	BS 1999 of 2006
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	12 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions
JUDGE:	Philip McMurdo J
ORDER:	**The plaintiff pay the costs of the first, second and fourth defendants, including any reserved costs, on the standard basis.**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTURE FROM THE

GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where subsequent to a summary judgment application being dismissed the plaintiff narrowed its case – whether defendants should be granted indemnity costs

PROCEDURE – COSTS – DEPARTURE FROM GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where plaintiff refused offer from defendants – where offer was not effective under r 361 UCPR – whether unreasonable for plaintiff to reject offer – whether defendants should be awarded indemnity costs

Uniform Civil Procedure Rules 1999 (Qld), r 361

Aircraft Technicians of Australia Pty Ltd v St Clair; St Clair v Timtalla Pty Ltd [2011] QCA 188 at [141], applied
Emanuel Management Pty Ltd v Fosters Brewing Group Ltd [2003] QSC 299, considered
Mango Boulevard Pty Ltd v Spencer & Ors [2009] QSC 389, cited
Mango Boulevard Pty Ltd v Spencer & Ors (No 2) [2012] QSC 347, cited
Velvet Glove Holdings Pty Ltd v Mount Isa Mines Ltd [2011] QCA 312, applied

COUNSEL: J K Bond SC with E Goodwin for the plaintiff
F M Douglas QC with D Smith and D D Keane for the first, second and fourth defendants

SOLICITORS: Minter Ellison for the plaintiff
Delta Law for the first, second and fourth defendants

[1] This judgment deals with the costs of the proceedings which were determined last November.[1] The outcome was that the plaintiff substantially failed. In an earlier judgment I declared that each of the first and second defendants was, in terms of cl 10.1(d) of the Shareholders Deed, unable to pay his or her debts.[2] Those facts were relevant only as elements of the plaintiff's case that, according to the deed, it was entitled to compulsorily acquire the defendants' shares and the insolvency of the first and second defendants was not seriously in issue.

[2] The plaintiff concedes that it should be ordered to pay the costs of the first, second and fourth defendants (referred to here as the defendants), including any reserved costs, on the standard basis. The defendants seek an assessment of those costs upon the indemnity basis from 1 April 2011, or alternatively from 24 November 2011. As a further alternative it seeks indemnity costs in relation to the issues pleaded in the plaintiff's Reply of 26 March 2010 and the Amended Reply of 7 December 2011. To explain the defendants' arguments, it is necessary to set out something of the pre-trial history.

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1 *Mango Boulevard Pty Ltd v Spencer & Ors (No 2)* [2012] QSC 347.
2 *Mango Boulevard Pty Ltd v Spencer & Ors* [2009] QSC 389.

[3] As I remarked in the principal judgment, this case has had a complex and unfortunate history. For present purposes, it is sufficient to begin with the application for summary judgment made by the defendants in April 2011. One of the plaintiff's arguments for resisting that application was that there were questions of fact which should be investigated at a trial, which related to a suggested estoppel. As at the April 2011 hearing, the plaintiff's pleading of that case was deficient. The plaintiff sought time to rectify the pleading. What then eventuated, over many months, was a rally of written submissions and the presentation of further affidavit material from the defendants, which exhibited documents running to more than 1,000 pages. The outcome was that the application for summary judgment was dismissed, because there was an issue to be tried about whether the defendants were estopped from relying upon the operation of the contract, as they contended it should operate upon its proper interpretation.

[4] After then there was substantial work done by each side towards the preparation for a trial which would involve not only the legal question upon which the case eventually turned, but also factual questions, including that relating to the alleged estoppel.

[5] Those factual questions became irrelevant when shortly prior to the trial, the plaintiff abandoned all of its pleaded case, save for the argument that upon the proper construction of the Shareholders Deed, there was no impediment to its right to acquire the defendants' shares from the plaintiff's own default.

[6] On 24 November 2011 (the day after the summary judgment application was dismissed) the defendants made an offer to compromise the proceeding, upon the terms that the plaintiff's claim be dismissed and that each party bear its own costs. That offer does not have effect pursuant to UCPR r 361, because the plaintiff subsequently obtained no judgment.

[7] The defendants seek indemnity costs from 1 April 2011, upon the basis that the case could and should have been decided then, by a grant of summary judgment in their favour, upon their argument as to the construction of the Shareholders Deed. The costs incurred after then have been wasted upon the litigation of allegations which were ultimately abandoned. Upon a similar argument, the defendants seek costs on the indemnity basis of the issues pleaded in the Reply of 26 March 2010 and the Amended Reply of 7 December 2011.

[8] The reasons why these arguments were abandoned remains unknown. The plaintiff has chosen not to waive its privilege in the legal advice which it received ahead of abandoning those arguments. There is nothing to be gained by speculating about those reasons and considering, for example, whether they were abandoned because the plaintiff was so confident about its prospects on the ultimate question, that it did not wish to incur the costs of a longer trial where those costs might not be recovered from these defendants. But what can be said is that the estoppel case, as ultimately pleaded, had no obvious legal flaw. The plaintiff successfully resisted an application for judgment upon the basis of that argument. Nor can it be said that this is a case where the unsuccessful party must always have known that there was some fundamental flaw in its case or part of its case.

[9] My concern about this argument for indemnity costs is that it might effectively penalise the plaintiff for confining the case as it did. Had the plaintiff not

abandoned these arguments, but still failed entirely, it would not have been visited with indemnity costs because it advanced many unsuccessful arguments rather than only one (absent a finding that those other arguments were so unreasonably advanced as to attract the burden of indemnity costs). The plaintiff should not be in the worse position of having confined its case. Making an order for indemnity costs upon this argument for the defendants could tend to discourage litigants from narrowing the scope of their litigation as it approaches a trial.

[10] I return to the question of the effect of the offer. In *Emanuel Management Pty Ltd v Fosters Brewing Group Ltd*,[3] Chesterman J (as he then was) referred to what he described as "slightly conflicting views" from the authorities about the impact of such an offer:

> "… On the one hand there is said to be a 'presumption' that the defendant should have its costs on the indemnity basis and the plaintiff must show some good reason why another order should be made. The second view is that the defendant must show that the offer was rejected unreasonably, judged in the circumstances known at the time it was made."[4]

Chesterman J referred to the breadth of the Court's discretion in this context but said that:

> "The making of an offer in the circumstances in question is a very relevant circumstance to be taken into account when exercising the discretion. If there are no countervailing circumstances the order for indemnity costs is likely to be made."[5]

More recently, it has been held that indemnity costs should not be awarded in this context unless it can be established that it was imprudent or plainly unreasonable of the plaintiff to reject the offer at the time at which it was made.[6]

[11] For the plaintiff it is said that it was not unreasonable for it to reject the offer, the first reason being that "the plaintiff did not stand to gain any substantial benefit from accepting the offer." It is said that "the overarching dispute between the parties would have been left unresolved." But in my view that cannot be accepted. The compromise of this case, by its agreed dismissal, would have put paid to the dispute between the parties which was the subject of this particular case, although it would not have disposed of the wider commercial dispute between the parties (which was the subject of other proceedings).

[12] Next it is said that the plaintiff was not unreasonable to refuse the offer and pursue interlocutory steps, particularly disclosure. I do not see that disclosure by the defendants was likely to make much difference, if at all, to the plaintiff's prospects. In particular, it was not going to affect the ultimate question, which was one of construction of the Shareholders Deed.

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3 [2003] QSC 299.

4 *Emanuel Management Pty Ltd v Fosters Brewing Group Ltd* [2003] QSC 299 at [38].

5 *Emanuel Management Pty Ltd v Fosters Brewing Group Ltd* [2003] QSC 299 at [39].

6 *Velvet Glove Holdings Pty Ltd v Mount Isa Mines Ltd* (2012) 28 BCL 351 at 371-2; [2011] QCA 312 at [105];.*Aircraft Technicians of Australia Pty Ltd v St Clair; St Clair v Timtalla Pty Ltd* [2011] QCA 188 at [141].

[13] Another reason given was that the defendants' offer did not contain and was not accompanied by any reasons or explanation as to why the plaintiff's case would fail. However, it was plain that the defendants were contending for the construction of the Shareholders Deed which ultimately prevailed.

[14] The other reason advanced by the plaintiff for justifying the rejection of the offer is that the plaintiff's argument as to the construction of the deed was not hopeless. In my view, that submission is persuasive. The plaintiff had an arguable case in that respect and given the commercial importance of the outcome, for the ownership of this joint venture, in my view it was not unreasonable for the plaintiff to reject the offer and put its argument for that interpretation of the deed at a trial.

[15] Ultimately therefore, I am unpersuaded to grant any award of indemnity costs. The plaintiff will be ordered to pay the costs of the first, second and fourth defendants, including any reserved costs, on the standard basis.