SUPREME COURT OF QUEENSLAND

CITATION:	*Roberts v Prendergast* [2013] QCA 89
PARTIES:	**SHANE GAVIN ROBERTS** (appellant) **v** **TREVOR PAUL PRENDERGAST** (respondent)
FILE NO/S:	Appeal No 5592 of 2012 SC No 7567 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Order
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Judgment delivered 15 March 2013 Further Order delivered 19 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Chief Justice and Fraser and Gotterson JJA Separate reasons for judgment of each member of the Court, Fraser and Gotterson JJA concurring as to the order made, Chief Justice dissenting
ORDER:	**Appellant to pay the respondent's costs of the appeal on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the appeal was dismissed – where the undisturbed judgment was for the amount of $54,375 comprised of $50,000 general damages for defamation and interest thereon of $4,375 – where the respondent to the appeal made an offer to settle which was rejected prior to the hearing of the appeal for the amount of $29,999 inclusive of interest plus costs on the standard basis – where this offer was made purporting to be pursuant to Chapter 9 Part 5 of the *Uniform Civil Procedure Rules* 1999 – where the provisions of Chapter 9 Part 5 relating to offers to settle do not apply to proceedings in the Court of Appeal – where the document containing the offer was not headed "without prejudice" – where the document did not state that the respondent reserved the right to rely on it on the issue of costs – whether this document containing the offer could be characterised as a *Calderbank* offer for the purposes of being awarded costs on the indemnity basis

Defamation Act 2005 (Qld), s 40
Uniform Civil Procedure Rules 1999 (Qld), r 766(1)(d)

Calderbank v Calderbank [1975] 3 WLR 586; [1975] 3 All ER 333; [1976] Fam 93, considered
Commonwealth of Australia v Gretton [2008] NSWCA 117, cited
Deepcliffe Pty Ltd v The Council of the City of Gold Coast & Anor [2001] QCA 396, cited
Grice v State of Queensland [2005] QCA 298, cited
Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) (2005) 13 VR 435; [2005] VSCA 298, cited
Kendell v Kendell [2005] QCA 390, cited
Mizikovsky v Queensland Television Limited & Ors [2013] QCA 68, followed
Oversea-Chinese Banking Corporation v Richfield Investments Pty Ltd [2004] VSC 351, cited
Tamwoy v Solomon [1996] 2 Qd R 93; [1995] QCA 447, followed
Tector v FAI General Insurance Company Ltd [2001] 2 Qd R 463; [2000] QCA 426, cited
Valleyfield Pty Ltd v Primac Ltd & Anor [2003] QCA 398, considered
Velvet Glove Holdings Pty Ltd v Mount Isa Mines Ltd [2011] QCA 312, cited
Wright & Anor v Keenfilly Pty Ltd & Anor [2007] QCA 148, cited

COUNSEL: No appearance by the appellant, the appellant's submissions were heard on the papers
No appearance by the respondent, the respondent's submissions were heard on the papers

SOLICITORS: Cooper Grace Ward for the appellant
Bennett & Philp for the respondent

[1] **CHIEF JUSTICE**: I disagree with Fraser JA and Gotterson JA.

[2] The determinative consideration is the respondent's offer to settle the appeal, which he made on 18 July 2012, under which he was prepared to accept an amount $20,000 less that that of the primary judgment ($50,000), and with costs of the appeal to be allowed on the standard basis.

[3] By contrast with the situation in *Tector v FAI General Insurance Company Ltd* [2001] 2 Qd R 463, to which my colleagues have referred, that was a large difference in amounts, and the offer was made early in the piece: the notice of appeal was filed on 25 June 2012, the offer was made on 18 July 2012, and the appeal was not heard until 13 November 2012.

[4] The appellant submits the offer was irrelevant because expressed to have been made under Chapter 9 Part 5 of the *Uniform Civil Procedure Rules*. Those rules do not relate to appeals. But that irregular header did not mean the offer was to be ignored.

The offer was plainly advanced in settlement of the appeal. All of its terms referred to the appeal. It is formalistic, perhaps disingenuous, for the appellant to say it was of no moment.

[5] Where the appellant (and, only implicitly) rejected an offer to settle, advanced so early, in an amount so substantially less than the judgment amount sustained on appeal, his approach should be characterized as unreasonable to the point where the appeal costs should be assessed on the indemnity basis.

[6] What has happened is that early in the appeal the respondent advanced a sensible compromise; the appellant ignored it; the respondent thereafter over some months incurred costs substantially surpassing standard costs; and having taken his chance, the appellant in the result lost the opportunity to have to pay some 40 per cent less than his liability under the primary judgment which was sustained.

[7] An object of the standard/indemnity regime, both at first instance and on appeal, is to encourage litigants to take a reasonable, rather than "bullish", approach to proceedings. The public substantially foots the bill for this process. The court, by its costs orders, should ensure that where litigants act unreasonably, they suffer a consequence, in the hope that more expeditious treatment will in the end consequently be available for others.

[8] I would have ordered that the appellant pay the respondent's costs of and incidental to the appeal to be assessed, as necessary, on the indemnity basis.

[9] **FRASER JA**: The nature of the application and the relevant circumstances are set out in the reasons of Gotterson JA, which I have had the advantage of reading in draft. I acknowledge that I have also had the advantage of reading the draft reasons of the Chief Justice.

[10] The appeal having been dismissed, the issue is whether in all of the relevant circumstances the appellant's failure to accept the respondent's offer to compromise the appeal by a consent reduction of the trial judgment in favour of the respondent from $54,375 to $29,999 (both inclusive of interest), with the appellant to pay the respondent's standard costs of the appeal, justifies an order that the respondent's costs of the appeal be assessed on the indemnity basis rather than on the standard basis.

[11] For the following reasons, I agree with the order proposed by Gotterson JA that the appellant should pay the respondent's costs of the appeal on the standard basis. I have reached this conclusion only after anxious consideration, particularly in light of the Chief Justice's reasons in favour of the contrary conclusion that the costs should be assessed on the indemnity basis. As the Victorian Court of Appeal observed in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2),*[1] "deciding whether conduct is 'reasonable' or 'unreasonable' will always involve matters of judgment and impression" and "… are questions about which different judges might properly arrive at different conclusions".

[12] The starting point is that there is no presumption or predisposition in favour of ordering assessment on the indemnity basis arising merely from a party to an appeal

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1 [2005] VSCA 298 at [23].

rejecting an offer and subsequently obtaining a less favourable judgment.[2] The decisions to which Gotterson JA has referred are to the effect that the usual order is that the costs of an appeal are to be assessed on the standard basis and that an assessment will be ordered on the indemnity basis only when "the conduct of the appeal by a party has been "plainly unreasonable" or there are other "special or unusual features" justifying a departure from the usual course".[3] Other decisions have adopted the test of unreasonableness without reference to the adverb "plainly".[4] In the circumstances of this case, the critical question seems to me to be whether the appellant acted unreasonably in not accepting the respondent's offer. In addressing that question, account must be taken of all relevant considerations, including (without limitation):

> "(a) the stage of the proceeding at which the offer was received;
>
> (b) the time allowed to the offeree to consider the offer;
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> (c) the extent of the compromise offered;
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> (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."[5]

[13] As to factor (f), the offer did not in terms foreshadow an application for indemnity costs in the event that the appellant did not accept it. On the other hand, the offer purported to have been made under Ch 9, Pt 5 of the *Uniform Civil Procedure Rules* 1999, in which there is provision for indemnity costs. In that context it could be said that the offer impliedly foreshadowed to the appellant (who had the benefit of legal representation) that an application might be made for costs to be assessed on the indemnity basis. That is so even though it has been established for many years that the relevant rules do not apply in appeals.[6] As to factors (a), (b), (c) and (e), the appellant's offer was in clear terms, it was made at an early stage of the proceeding, and the proposed compromise was substantial. In the circumstances of this case, however, the question whether those factors reveal any element of unreasonableness in the respondent's failure to accept the offer largely depends upon a consideration of factor (d), the prospects of success assessed at the date of the offer.

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2 *Tector v FAI General Insurance Company Limited* [2001] 2 Qd R 463 at 464. See also *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] VSCA 298 at [19], in which the Victorian Court of Appeal referred to the rejection of any such presumption in *Oversea-Chinese Banking Corporation v Richfield Investments Pty Ltd* [2004] VSC 351 (Redlich J) and by the New South Wales Court of Appeal, the Federal Court, and this Court.

3 *Kendell v Kendell* [2005] QCA 390 at [21] (Keane JA, McMurdo P and Douglas J concurring), referring to *Tector v FAI General Insurance Co Ltd* [2001] 2 Qd R 463 and *Deepcliffe Pty Ltd v The Council of the City of Gold Coast & Anor* [2001] QCA 396.

4 See, eg, *Grice v State of Qld* [2005] QCA 390 at [6]-[7]. See also *Wright & Anor v Keenfilly P/L & Anor* [2007] QCA 148 at [10].

5 *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] VSCA 298 at [23], [25], referred to with approval in, for example, *Velvet Glove Holdings Pty Ltd v Mount Isa Mines Ltd* [2011] QCA 312 at [105] – [106].

6 *Tector v FAI General Insurance Company Limited* [2001] 2 Qd R 463 at [3], applying to UCPR the decision upon the analogous, repealed *Rules of the Supreme Court* in *Tamwoy v Solomon* [1996] 2 Qd R 93.

[14] As to this factor, the Court's rejection of the appeal makes it easy to conclude in hindsight that the appellant had poor prospects of success, but hindsight must be put aside. My view is that the appellant could have concluded, reasonably albeit wrongly, that he might obtain a reduction in the trial judgment to an amount below the amount offered by the respondent. In those circumstances, acceptance of the offer might well have been a prudent and reasonable course for the appellant to take, but it does not follow that his failure to accept the offer was unreasonable or (if this makes any practical difference, which I doubt) plainly unreasonable. I conclude that that there was nothing unreasonable in the appellant's failure to accept the offer. In so concluding, I have taken into account the other circumstances relied upon by the respondent. On that topic, I respectfully agree with Gotterson JA's reasons for concluding that neither the combination of the modest amount of the damages award and the prospects of the appellant's case on appeal nor the suggested analogy in appeals with the provision applicable at trials in s 40 of the *Defamation Act* 2005 amounts to special or unusual features such as to justify assessment of the respondent's costs on the indemnity basis.

[15] My conclusion that the appellant's failure to accept this offer does not justify an order for the assessment of the respondent's costs on the indemnity basis does not mean that there are no substantial incentives for respondents to make offers to settle in similar cases. The potential benefits of such offers include but extend beyond the possibility of indemnity costs where an offer is unreasonably not accepted. To take this case as an example, if the Court had substantially reduced the amount of the trial judgment, the appellant would have had a strong prima facie claim to be awarded the costs of the appeal on the footing that the usual approach is that costs follow the event. Provided the reduction of the award did not extend below the amount of the respondent's offer, however, the appellant's failure to accept the offer could have been taken into account in favour of making a costs order which was more favourable to the respondent, and that is so whether or not the appellant's failure to accept the offer was or was not unreasonable.[7] I would here adopt the approach which I favoured in *Mizikovsky v Queensland Television Limited & Ors*[8] that "[a]s the litigation fell out, it was the respondents who were entitled to the benefit of that usual approach to costs, but it does not follow that the appellant's mere failure to accept the offer afforded a ground for the costs awarded in favour of the respondents to be assessed on an indemnity basis."

[16] **GOTTERSON JA**: In accordance with leave granted on 15 March 2013, each party has made written submissions with respect to the costs of this appeal. In each case, the submissions are accompanied by a short affidavit which exhibits offers of settlement of the appeal made by the parties.

[17] Before turning to the terms of those offers, I note that the substantive order made on 15 March was one dismissing an appeal from a judgment given in favour of the plaintiff, who is respondent to this appeal, on 1 June 2012. The judgment was for the amount of $54,375 comprised of $50,000 general damages for defamation and interest thereon of $4,375. The costs order made at trial was that the defendant, who is the appellant here, pay the respondent's costs on an indemnity basis as if the proceeding had been brought in the District Court.

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7 See *Commonwealth of Australia v Gretton* [2008] NSWCA 117 at [1] per Mason P; at [108] per Beazley JA; and at [120]-[122] per Hodgson JA. See also *Valleyfield P/L v Primac Ltd & Anor* [2003] QCA 398 at [7].

8 [2013] QCA 68 at [54].

[18] The appellant filed a Notice of Appeal on 25 June 2012. The appeal was against the damages assessed only. In the Notice of Appeal, the appellant sought orders allowing the appeal and substituting a judgment for the respondent of nominal damages of $1.00 and an order that the respondent pay the appellant's costs of the proceeding in the trial division.

[19] On 18 July 2012, the respondent's solicitors sent a letter to the appellant's solicitors with which was enclosed a document headed "Offer to Settle Pursuant to Chapter 9 Part 5 of the Uniform Civil Procedure Rules" also dated that date. Neither the letter nor the document was marked "without prejudice". The document did not state that the respondent reserved the right to rely on it on the issue of costs.

[20] The document contained an offer on the respondent's part to settle the appeal on the basis that in lieu of the money judgment in his favour, there be judgment for him in the amount of $29,999 inclusive of interest, with the costs order in his favour undisturbed. The offer also proposed that the appellant pay the respondent's costs of and incidental to the appeal on the standard basis. This offer was open for acceptance within 15 days but was not accepted.

[21] The appellant filed and served his Outline of Argument on 30 July 2012. Then, on 17 August 2012 his solicitors wrote a letter to the respondent's solicitors which was marked "Without prejudice save as to costs". It proposed settlement of the appeal on a very different basis, namely, that the judgment and costs order of 1 June 2012 be set aside by consent and that in lieu, the parties consent to orders on the following terms:

(a) the appellant pay the respondent the sum of $5,000 inclusive of interest;

(b) the appellant pay the respondent's costs of the trial division proceeding on the standard basis until 9 May 2012 as if the proceeding had been brought in the District Court; and

(c) the respondent pay the appellant's costs of that proceeding on the standard basis from 10 May 2012 until the conclusion of the trial as if that proceeding had been brought in the District Court.

This letter also proposed that the respondent pay the appellant's costs of the appeal on the standard basis. This offer, open for acceptance for 14 days, was not accepted either.

[22] Next, the respondent's Outline of Argument was filed and served on 20 August 2012. The appellant filed and served a Reply on 28 August 2012. The appeal was heard on 13 November 2012.

[23] The current issue for determination is as to the basis on which the unsuccessful appellant should be ordered to pay the respondent's costs of the appeal. The appellant submits that it is the standard basis; whereas the respondent submits for the indemnity basis.

[24] It is common ground that the relevant source of power for awarding costs is r 766(1)(d) of the *Uniform Civil Procedure Rules* ("UCPR") which confers a wide discretion on this Court to make an order as to costs of an appeal as it considers

appropriate. In *Tector v FAI General Insurance Company Limited*,[9] this Court, in the course of considering this rule observed:

> "The ordinary rule is that costs when ordered to be paid in adversary litigation are to be recovered on the standard basis and should only be departed from where the conduct of the party against whom the order is sought is plainly unreasonable. …"[10]

[25] A little later in *Deepcliffe Pty Ltd v The Council of the City of Gold Coast & Anor*,[11] this Court spoke of a requirement of 'some unusual or differentiating feature about the case' in order to justify a departure from the standard basis.[12] Drawing on both decisions, Keane JA in *Kendell v Kendell*[13] stated the position to be as follows:

> "… Despite the existence of this wide power, the Court will usually only award costs on the standard basis unless it is of the view that the conduct of the appeal by a party has been 'plainly unreasonable' or there are other 'special or unusual features' justifying a departure from the usual course."[14]

[26] The decisions of *Tector*[15] and *Deepcliffe*[16] establish that the provisions of Chapter 9 Part 5 UCPR (rules 352 to 365 inclusive) relating to offers to settle, do not apply to proceedings in the Court of Appeal. Thus the procedure ensuring the award of indemnity costs in r 360 was inapplicable to this appeal. The appellant submits that on that account, the offer contained in the respondent's document dated 18 July 2012, which is referenced to Chapter 9 Part 5, should not be taken into account in exercise of the r 766(1)(d) discretion. Faced with the inapplicability of the r 360 procedure, the respondent seeks to characterise the offer as in the nature of a *Calderbank* offer[17] and to attribute relevance to it for the discretion on that account.[18]

[27] The decision in *Tector*[19] indicates that the making of a *Calderbank* offer to a party to an appeal who does not accept it but fails to achieve a better outcome, has relevance to, but not a decisive influence upon, whether there ought to be a departure from the ordinary rule. There, the costs of the appeal were awarded on the standard basis notwithstanding such an offer, having regard to other aspects of the appeal litigation.

[28] Later, in *Valleyfield Pty Ltd v Primac Ltd*,[20] this Court observed that an offer made between judgment at the trial and the hearing of the appeal "may have similar effect to a Calderbank offer".[21] In that case, such an offer had been made although it appears not to have been made in a form which adopted *Calderbank* terminology.

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9 [2001] 2 Qd R 463.
10 At [5].
11 [2001] QCA 396.
12 At [5].
13 [2005] QCA 390; McMurdo P and Douglas J concurring.
14 At [21].
15 At [3].
16 At [4].
17 *Calderbank v Calderbank* [1976] Fam 93 at 106.
18 Written submissions para 6.
19 At [5].
20 [2003] QCA 398.
21 At [6].

[29] Comparable circumstances have occurred here. The letter and document dated 18 July 2012 do not contain some of the characteristic features of a *Calderbank* offer and do not refer expressly to *Calderbank* principles. Notwithstanding, they did unquestionably convey and offer of terms for settlement of the appeal that was capable of acceptance. Consistently with the approaches taken in *Tector* and *Valleyfield*, the offer thereby made should be accorded a relevance to, but not a decisive influence upon, the order of costs of the appeal.

[30] The respondent sought to rely on two other matters as special or unusual features of the appeal as justifying an award of indemnity costs. One of them was a combination of the comparatively modest amount of the damages award with the weakness of the appellant's case. The appellant's challenge was to the amount of general damages awarded. In cases where, as here, general damages are at large and there is a dearth of comparable awards which might offer guidance, in any given case, there is room for difference of opinion with respect to the range within which an award which bears an appropriate and rational relationship to the harm sustained by the injured party, might fall.[22] Given this, it was not, in my view, plainly unreasonable for the appellant either to initiate a challenge the quantum of the general damages award made at trial or to continue the challenge once the offer had been made, even though the challenge ultimately failed.

[31] The other matter is an analogy which the respondent sought to draw with s 40 of the *Defamation Act* 2005. Subsection 2 of that provision deals specifically with costs of proceedings brought where there is an unreasonable failure to make or accept a settlement offer by the defendant or the plaintiff respectively. It does not, in its terms, apply to appeals. I do not consider that the subsection can or ought to be given an application by analogy to appeals. In any event, any potential relevance that the subsection could have here is all but excluded by the shortcomings of the offer made by the respondent to which I have referred.

[32] In summary, the respondent has not established that the appellant has acted plainly unreasonably or that there are any special or unusual features of the appeal which would justify departure from the ordinary rule.

Order

[33] I would propose the following order:

1. Appellant to pay the respondent's costs of the appeal on the standard basis.

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22 Compare *Tector* at [6].