SUPREME COURT OF QUEENSLAND

CITATION:	*Wright v KB Nut Holdings Pty Ltd* [2013] QCA 153
PARTIES:	**ROBYN JOY WRIGHT** (appellant) **v** **KB NUT HOLDINGS PTY LTD as trustee for the KERRIE-ANN STEVENSON FAMILY TRUST (ACN 127 054 872) trading as 'BONAPARTES SERVICED APARTMENTS'** (respondent)
FILE NO/S:	Appeal No 7435 of 2012 SC No 3367 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Orders
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	18 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Muir JA and Margaret Wilson and Douglas JJ Judgment of the Court
ORDERS:	**1. The respondent pay the appellant's costs of and incidental to the proceedings at first instance, other than the costs referred to in order 2 hereof, assessed on the indemnity basis.** **2. The appellant pay the respondent's costs reserved by Robin QC DCJ on 14 March 2012 assessed on the standard basis.** **3. The respondent pay the appellant's costs of and incidental to the appeal assessed on the standard basis except for the costs of and incidental to the submissions to this Court on costs.** **4. The respondent pay one-half of the appellant's costs of and incidental to such submissions on costs assessed on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the Court allowed the appellant's appeal and ordered that the respondent pay the appellant $494,759.38 together with interest thereon – where the parties were directed to file and exchange written submissions on costs – where the appellant seeks costs on an indemnity basis in respect of the proceedings at first instance and on appeal –

where the appellant relies on a mandatory final offer under s 39 of the *Personal Injuries Proceedings Act* 2002 (Qld) and offers made pursuant to Chapter 9 Part 5 of the UCPR – where the respondent contends that it did not act unreasonably in not accepting the offers due to evidentiary issues regarding the extent of the appellant's psychiatric/psychological impairment – where the respondent had the benefit of a judgment in its favour and submits that it acted reasonably in attempting to uphold the judgment on appeal – whether costs should be assessed on the indemnity basis

Personal Injuries Proceedings Act 2002 (Qld), s 39, s 40(8)
Uniform Civil Procedure Rules 1999 (Qld), r 360

Di Carlo v Dubois & Ors [2002] QCA 225, cited
Johnston & Anor v Herrod & Ors [2012] QCA 361, cited
Lawes v Nominal Defendant [2007] QSC 103, cited
Wright v KB Nut Holdings Pty Ltd [2013] QCA 66, related
Wright v K B Nut Holdings P/L (as Trustee for the Kerrie-Ann Stevenson Family Trust) t/as Bonapartes Serviced Apartments" (No 3) [2012] QDC 216, related
Yara Nipro P/L v Interfert Australia P/L [2010] QCA 164, 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: Shine Lawyers for the appellant
HBM Lawyers for the respondent

[1] **THE COURT**: On 2 April 2013, this Court allowed the appellant's appeal and ordered that the respondent pay the appellant $494,759.38 together with interest thereon. The parties were directed to file and exchange written submissions on costs. The appellant seeks costs on an indemnity basis in respect of the proceedings at first instance and on appeal. In seeking indemnity costs of the trial, the appellant relies on a mandatory final offer made under s 39 of the *Personal Injuries Proceedings Act* 2002 (the Act) and on offers made under Chapter 9 Part 5 of the *Uniform Civil Procedure Rules* 1999 (the UCPR). The history of the offers is recorded as follows in the reasons of the primary judge published on 17 August 2012:[1]

> "• mandatory final offer of the *[appellant]* delivered at the compulsory conference on 2 September 2010 in the amount of $200,000.00 plus standard costs;
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> • mandatory final offer of the *[respondent]* delivered at the compulsory conference on 2 September 2010 in the amount of $Nil;

[1] *Wright v K B Nut Holdings P/L (as Trustee for the Kerrie-Ann Stevenson Family Trust) t/as Bonapartes Serviced Apartments" (No 3)* [2012] QDC 216 at [6].

- offer pursuant to Chapter 9 Part 5 of the *UCPR* of the *[respondent]* delivered on 6 June 2011 in the amount of $100,000.00 plus standard costs and outlays on the District Court scale;

- offer pursuant to Chapter 9 Part 5 of the *UCPR* of the *[appellant]* delivered on 7 February 2012 in the amount of $200,000.00 plus standard costs and outlays on the District Court scale; and

- offer pursuant to Chapter 9 Part 5 of the *UCPR* of the *[appellant]* delivered on 15 March 2012 in the amount of $300,000.00 plus standard costs and outlays on the District Court scale."

[2] The appellant referred to s 40(8) of the Act which provides:

> "However, the court must, if relevant, have regard to the mandatory final offers in making a decision about costs."

[3] It was submitted that:

- considerations relevant to ordering costs on an indemnity basis were whether a party had "imprudently or unreasonably failed to accept [an] offer"[2] and "the imprudent refusal of an offer";[3] and

- the respondent's failure to accept each of the mandatory final offers was imprudent and unreasonable having regard to the state of the evidence as to the extent or, in particular, of the appellant's psychiatric impairment.

[4] It is unnecessary to consider the consequences of the application of s 40(8). Offers were made under r 360 of the UCPR. That rule provides:

> "**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."

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2 *Lawes v Nominal Defendant* [2007] QSC 103 at 5–6.

3 *Di Carlo v Dubois & Ors* [2002] QCA 225 at [37].

[5] The respondent did not contest the allegation that two offers had been made under r 360 by the appellant. Accordingly, the first of the offers "is taken to be the only offer" for the purposes of the rule.

[6] The implicit submission of the respondent was that it has shown that another order for costs is appropriate in the circumstances because it was not until 13 March 2012, the day before the trial was first due to take place, that the respondent was given notice of a medical opinion that the appellant's whole person impairment was 57 per cent. Until then, the expert evidence had suggested a 17 per cent whole person impairment. At that time, the respondent had not been able to have the appellant reassessed by its expert. It was submitted also that there were numerous evidentiary issues, particularly in relation to the extent of the appellant's psychiatric/psychological impairment. In that regard, reference was made to the "wide range of other stressors in the appellant's life apart from the needle stick injury, which the respondent was reasonably able to regard as a significant part of her psychological predicament".

[7] Having regard to the fact that the first of the offers under the rules was only $200,000, the respondent's argument against the application of r 360 is not compelling. The evidence also does not suggest that an even more modest offer was likely to have been accepted by the respondent unless it was at or near the level of its 6 June 2011 offer. The respondent, however, does make a valid point that it should not have to pay the costs reserved by Robin QC DCJ on 14 March 2012 in respect of the adjournment of the trial. That adjournment was occasioned by the appellant's late production of expert evidence.

[8] The argument that indemnity costs should be ordered on the appeal was based on the provisions of the Act. It was submitted that there was no definition of "proceeding" in s 40 and that "proceeding" was a "very wide term". It was submitted also that this Court could take into account, as a special circumstance, the additional anxiety caused to the appellant by the respondent's "imprudent rejection of the [appellant's] offers".

[9] Even if the mandatory final offers are relevant, they do not necessitate an order that the respondent pay the costs of the appeal on an indemnity basis. As the respondent pointed out in its submissions, it had the benefit of a reasoned, detailed decision in its favour. It acted reasonably in attempting to uphold the judgment. The circumstances of the parties at first instance are obviously markedly different and different considerations in respect of costs will normally apply at first instance than on appeal. Costs on an indemnity basis are ordinarily not ordered "unless there is some unusual circumstance or unreasonable conduct other than mere non-acceptance of an offer to settle made before trial".[4] There are no aspects of the respondent's conduct in respect of this appeal which would tend to suggest that an indemnity costs order would be appropriate.[5] The appellant's argument that the respondent pay the costs of the appeal on the indemnity basis should therefore be rejected. Because of this and because the appellant's submissions were unnecessarily prolix and diffuse, the appellant should not be awarded all of its costs of the submissions on costs.

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4 *Yara Nipro P/L v Interfert Australia P/L* [2010] QCA 164 at [15].

5 For a discussion of general principles, see *Johnston & Anor v Herrod & Ors* [2012] QCA 361 at [6]–[11] inclusive.

[10] For the above reasons, the orders of the Court are that:

1. The respondent pay the appellant's costs of and incidental to the proceedings at first instance, other than the costs referred to in order 2 hereof, assessed on the indemnity basis.

2. The appellant pay the respondent's costs reserved by Robin QC DCJ on 14 March 2012 assessed on the standard basis.

3. The respondent pay the appellant's costs of and incidental to the appeal assessed on the standard basis except for the costs of and incidental to the submissions to this Court on costs.

4. The respondent pay one-half of the appellant's costs of and incidental to such submissions on costs assessed on the standard basis.