

# SUPREME COURT OF QUEENSLAND

CITATION: *Reeves v O’Riley* [2013] QCA 285

PARTIES: **SUSAN FLORANCE REEVES (as Executrix of the will of GARY EDWARD PERRY deceased)**  
(appellant)  
v  
**SYLVIA LOUISE O’RILEY**  
(respondent)

FILE NO/S: Appeal No 533 of 2013  
DC No 363 of 2012

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal - Further Order

ORIGINATING COURT: District Court at Townsville

DELIVERED ON: 1 October 2013

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Holmes and Muir JJA and Mullins J  
Judgment of the Court

ORDER: **There is no variation as to the order in the original judgment.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the appellant’s appeal was dismissed, with costs – where leave was given to the parties to make submissions as to whether costs should be awarded on an indemnity basis – where the respondent’s application for indemnity costs was made on the basis of the appellant’s refusal of a *Calderbank* offer – whether the conduct of the appellant in refusing the offer was “plainly unreasonable” so as to warrant a departure from the usual order for costs – whether the appellant had any real prospect of success – whether costs should be awarded on an indemnity basis

*Uniform Civil Procedure Rules* 1999 (Qld), Chapter 9 Part 5

*Calderbank v Calderbank* [1975] 3 WLR 586, cited  
*Deepcliffe Pty Ltd & Anor v The Council of the City of Gold Coast & Anor* [\[2001\] QCA 396](#), cited  
*Hazeldene’s Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435; [2005] VSCA 298, considered  
*Reeves v O’Riley* [\[2013\] QCA 229](#), related

*Tector v FAI General Insurance Company Ltd* [2001] 2 Qd R 463; [2000] QCA 426, cited  
*Verhagen & Anor v Millard* [2013] QCA 202, 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: Bill Cooper & Associates for the appellant  
 Purcell Taylor Lawyers for the respondent

- [1] **THE COURT:** On 23 August 2013, this court dismissed with costs the appellant's appeal against a declaration that certain correspondence constituted a binding agreement for the transfer of property.<sup>1</sup> Leave was given to the parties to make submissions as to whether those costs should be awarded on an indemnity basis, notwithstanding the respondent's omission to comply with Practice Direction No 3 of 2013 by making the application at the hearing of the appeal.<sup>2</sup>
- [2] The respondent's application for indemnity costs was made on the basis of the appellant's refusal of a *Calderbank*<sup>3</sup> offer. Within a week of the filing of her notice of appeal, the respondent made an offer to settle the appeal on terms that the appellant comply with orders made in the District Court for the transfer of the property, the parties bear their own costs of the appeal and the respondent not enforce the costs order made in the District Court in respect of the proceeding there. The offer was expressed to be open for a period of 14 days from its receipt. The appellant was placed on notice that, should it not be accepted, it would be relied on in an application for costs on an indemnity basis.
- [3] The provisions of Chapter 9 Part 5 of the *Uniform Civil Procedure Rules*, which relate to offers to settle, have no application to Court of Appeal proceedings.<sup>4</sup> The fact that an appellant has failed on an appeal after an offer to settle has been made does not, without more, warrant an order for indemnity costs.<sup>5</sup> An order for indemnity costs will be made only if the "conduct of the party against whom the order is sought is plainly unreasonable"<sup>6</sup> or there is some other unusual feature to justify it.<sup>7</sup>
- [4] The respondent addressed the factors which the Victorian Court of Appeal said in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)*<sup>8</sup> should be considered in determining whether the rejection of a *Calderbank* offer was unreasonable:
- “(a) the stage of the proceeding at which the offer was received;
  - (b) the time allowed to the offeree to consider the offer;

<sup>1</sup> *Reeves v O'Riley* [2013] QCA 229.

<sup>2</sup> That failure does not necessarily preclude the seeking of the indemnity costs order: *Verhagen & Anor v Millard* [2013] QCA 202.

<sup>3</sup> *Calderbank v Calderbank* [1975] 3 WLR 586.

<sup>4</sup> *Tector v FAI General Insurance Company Ltd* [2001] 2 Qd R 463 at 464.

<sup>5</sup> *Deepcliffe Pty Ltd & Anor v The Council of the City of Gold Coast & Anor* [2001] QCA 396.

<sup>6</sup> *Tector v FAI General Insurance Company Ltd* at 464.

<sup>7</sup> *Deepcliffe Pty Ltd & Anor v The Council of the City of Gold Coast & Anor* at [5].

<sup>8</sup> (2005) VR 435.

- (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 [sic] indemnity costs in the event of the offeree's rejecting it."<sup>9</sup>

- [5] That list is not, of course, exhaustive. Of the matters listed, the timing of the offer, the length of time given for its consideration and the foreshadowed application for indemnity costs are all in the respondent's favour. And, certainly, the appellant would have been very much better off had she accepted the compromise; the respondent's affidavit material showed that the costs in question were of the order of \$50,000. But those factors are not of great weight. The most important issue in considering whether the refusal of the offer was plainly unreasonable is whether the appellant had any prospect of success on the appeal.
- [6] The appellant's principal contention on the appeal was that the letter relied on as amounting to an offer was uncertain, because it did not make it clear who was liable to pay the consideration. This court concluded otherwise, but it should be noted that its construction of the correspondence on the point varied from that of the trial judge. Other arguments made by the appellant in her written submissions were not pressed strongly in the oral submissions made on the hearing of the appeal, as the respondent pointed out.
- [7] But, importantly, there was a genuine question of construction involved and the appellant's argument was by no means hopeless, although ultimately unsuccessful. We do not think that the rejection of the respondent's offer was "plainly unreasonable" or that there were any unusual features to the case which would warrant a departure from the usual order for costs. We will, therefore, make no variation to the order as it appears in the judgment.

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<sup>9</sup> At [25].