SUPREME COURT OF QUEENSLAND

CITATION:	*J & D Rigging Pty Ltd v Agripower Australia Limited & Ors* [2014] QCA 23
PARTIES:	**J & D RIGGING PTY LTD** ACN 075 350 140 (appellant) **v** **AGRIPOWER AUSTRALIA LIMITED** ACN 123 823 226 (first respondent) **ADJUDICATE TODAY PTY LIMITED** ACN 109 605 021 (second respondent) **HELEN DURHAM** (third respondent)
FILE NO:	Appeal No 6662 of 2013 SC No 2128 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Orders
ORIGINATING COURT:	Court of Appeal
DELIVERED ON:	21 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Holmes JA and Applegarth and Boddice JJ Judgment of the Court
FURTHER ORDERS:	**1. The order for costs made in paragraph 3 of the orders pronounced on 20 December 2013 should be confirmed with the addition of the words "to be assessed on the standard basis".** **2. The first respondent pay the appellant's costs of and incidental to the appeal to be assessed on the standard basis up to and including 20 December 2013.** **3. The appellant pay the first respondent's costs of and incidental to the submissions on costs filed on 31 January 2014 and 7 February 2014.**
CATCHWORDS:	PROCEDURE – COSTS – INDEMNITY COSTS – where prior to the original hearing *Calderbank* offer made to the applicant, which was not accepted – where the respondent was unsuccessful at first instance – where the respondent to that application was successful on appeal – whether the decision to reject the *Calderbank* offer was unreasonable or imprudent – whether the applicant is entitled to costs on the indemnity basis

Edelbrand Pty Ltd v HM Australia Holdings Pty Ltd (No 2) [2012] NSWCA 217, cited
Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) (2005) 13 VR 435; [2005] VSCA 298, followed
McBride v ASK Funding Ltd [2013] QCA 130, cited
Oversea Chinese Banking Corporation v Richfield Investments Pty Ltd [2004] VSC 351, cited
Velvet Glove Holdings Pty Ltd v Mount Isa Mines Ltd [2011] QCA 312, cited

COUNSEL: No appearance by the appellant, the appellant's submissions were heard on the papers
No appearance by the first respondent, the first respondent's submissions were heard on the papers
No appearance for the second and third respondents

SOLICITORS: Boulton Cleary & Kern for the appellant
TressCox Lawyers for the first respondent
No appearance for the second and third respondents

[1] **THE COURT:** The appellant was successful in its appeal.[1] The decision at first instance to declare the adjudication decision void was set aside. As a result of the appeal, the appellant has the benefit of a decision which awarded it an amount of just over $2.5 million. The first respondent accepts that costs orders ought to be made in favour of the appellant in respect of both the proceeding at first instance and the appeal, assessed on the standard basis. But the appellant seeks both its costs at first instance and on appeal to be assessed on an indemnity basis. The sole basis upon which the appellant seeks costs on an indemnity basis is the failure of the first respondent to accept a *Calderbank* offer which was made shortly before the hearing at first instance.

The *Calderbank* offer

[2] The offer, dated 23 April 2013, was made one day after the first respondent served its written outline pursuant to directions made with respect to the originating application. The offer expired at 4.00 pm on 1 May 2013, which was five business days before the hearing at first instance.

[3] The offer to settle was made on the following basis:

1. The application be dismissed;
2. The sum of $2,604,188.47 paid into Court by the applicant, together with any accretions, be released to the [appellant]; and
3. The [appellant] pay the [first respondent's] costs fixed in the sum of $15,000.

The offer did not seek any of the appellant's costs of the proceeding at first instance.

[4] The offer was not accepted. The first respondent (the applicant at first instance) succeeded upon its application, and in doing so, the commercial result was significant. It was relieved of the obligation to pay the adjudicated amount, together with any interest which had accrued upon it. That success has now been reversed, essentially because this Court reached a different conclusion to the learned primary judge on a point of statutory construction.

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1 *J & D Rigging Pty Ltd v Agripower Australia Pty Ltd & Ors* [2013] QCA 406.

Relevant principles

[5] The failure to accept a *Calderbank* offer is a matter to which a court should have regard when considering whether to order indemnity costs.[2] The refusal of an offer to compromise does not warrant the exercise of the discretion to award indemnity costs. The critical question is whether the rejection of the offer was unreasonable in the circumstances.[3] The party seeking costs on an indemnity basis must show that the party acted "unreasonably or imprudently" in not accepting the *Calderbank* offer.[4]

[6] In *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)*[5], the Victorian Court of Appeal stated that a court considering a submission that the rejection of a *Calderbank* offer was unreasonable should ordinarily have regard to at least the following matters:

> "(a) the stage of the proceeding at which the offer was received;
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> (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;
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> (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."

[7] As to the first matter, and as already noted, the offer was received about two weeks before the date of the hearing before the learned primary judge. Factors (e) and (f) are not contentious. The terms of the offer were clear and the offer foreshadowed an application for indemnity costs in the event the offer was not accepted.

The time allowed to the offeree to consider the offer

[8] The first respondent was given seven days within which to accept the offer. The appellant's written submissions were delivered after 4.00 pm on 30 April 2013 and the *Calderbank* offer expired at 4.00 pm the next day. Those submissions were 16 pages long and contained 86 paragraphs. Although the appellant contends that the material was not factually complex and the arguments were delineated, the first respondent was given little time to assess the merits of the appellant's submissions before the offer lapsed. It was not unreasonable for the first respondent to allow the *Calderbank* offer to lapse in circumstances where it had insufficient time to consider the merits of the appellant's submissions. This is especially so when regard is had to the extent of the compromise offered.

The extent of compromise offered

[9] The offer dealt with a pre-hearing component for costs in the amount of $15,000 in favour of the first respondent. The element of compromise related to interest and

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2 *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435 at 441 [20]; [2005] VSCA 298 at [20].

3 At 441 [23].

4 *McBride v ASK Funding Ltd* [2013] QCA 130 at [65].

5 [2005] 13 VR 435 at 442 [25], an authority frequently cited with approval in this and other Australian courts.

the appellant's costs. By the time the offer expired the first respondent would have incurred substantial costs in preparing for the hearing, including preparation of submissions in accordance with the Court's direction. The amount effectively offered by way of compromise by the appellant was relatively small when compared to the principal amount in dispute, which exceeded $2.5 million.

The offeree's prospects of success, assessed as at the date of the offer

[10] In its submissions on costs to this Court, the appellant emphasises the arguments upon which it prevailed in the appeal. It downplays the competing arguments that were advanced by the first respondent at first instance and further developed upon appeal. The arguments related to the proper construction of words appearing in s 10 of the *Building and Construction Industry Payments Act* 2004 (Qld). The first respondent had substantial arguments in its favour. Its prospects of success, assessed as at the date of the offer, could not have been fairly described as poor. They had substantial merit, as reflected in their general acceptance by the learned primary judge.

Did the first respondent act unreasonably or imprudently in failing to accept the *Calderbank* offer?

[11] Given the very limited time within which the first respondent had to consider the offer in the light of the appellant's written submissions, the limited extent of compromise when regard is had to the amount in dispute and the first respondent's prospects of succeeding in its application, the appellant has failed to demonstrate that the first respondent acted unreasonably or imprudently in failing to accept the *Calderbank* offer. Whilst the availability of special orders for costs where offers of compromise are rejected serves the policy of encouraging settlement, there are other competing objectives of equal importance. As was said by Redlich J in *Oversea-Chinese Banking Corporation v Richfield Investments Pty Ltd*[6]:

> "Potential litigants should not be discouraged from bringing their dispute 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."

[12] In circumstances in which the parties' dispute turned upon a point of statutory construction and the first respondent's arguments could not be said to be without prospects[7], it was not unreasonable for the first respondent to seek resolution of the application at the pending hearing and allow an offer which offered little compared to the amount in dispute to lapse.

The costs of the appeal

[13] There was no offer, *Calderbank* or otherwise, to compromise the appeal.

[14] The appellant seeks its costs of the appeal on an indemnity basis for the reason that, had the *Calderbank* offer to settle the originating application been accepted, then the appeal proceedings would not have been required, and the appellant would not have been put to the costs of the appeal, in which it was successful.

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6 [2004] VSC 351 at [60], cited with approval in *Hazeldene's Chicken Farm* (supra) at 441 [22].

7 Compare the position in relation to a point of contractual interpretation in *Velvet Glove Holdings Pty Ltd v Mount Isa Mines Ltd* [2011] QCA 312 at [106].

[15] The *Calderbank* offer does not warrant the costs of the proceedings at first instance being assessed on the indemnity basis for the reasons set out above. For the same reasons, it does not justify the costs of the appeal being assessed on an indemnity basis.

[16] Moreover, the first respondent having been successful at first instance, and having grounds to resist the appeal, it was reasonable of it to litigate the appeal. Where there was no attempt by the appellant to compromise the appeal, it is not appropriate to make an order for indemnity costs in respect of it.[8]

Conclusion and orders

[17] The first respondent accepts that orders for costs should be made in favour of the appellant in respect of the proceedings at first instance and of the appeal on the standard basis. This is the appropriate basis. The appellant's submissions that costs should be assessed on the indemnity basis are unmeritorious. The appellant should pay the first respondent's costs of and incidental to the submissions on costs filed on 31 January 2014 and 7 February 2014.

[18] The order for costs made in paragraph 3 of the orders pronounced on 20 December 2013 should be confirmed with the addition of the words "to be assessed on the standard basis". There should be additional orders that:

1. The first respondent pay the appellant's costs of and incidental to the appeal to be assessed on the standard basis up to and including 20 December 2013.

2. The appellant pay the first respondent's costs of and incidental to the submissions on costs filed on 31 January 2014 and 7 February 2014.

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8 *Edelbrand Pty Ltd v HM Australia Holdings Pty Ltd (No 2)* [2012] NSWCA 217 at [13].