SUPREME COURT OF QUEENSLAND

CITATION:	*Du Pradal & Anor v Petchell (No 2)* [2014] QSC 288
PARTIES:	**JACQUES DU PRADAL** **(first plaintiff)** **PIA DU PRADAL PTY LTD (ACN 067 906 450)** **(second plaintiff)** **v** **DAVID PETCHELL** **(defendant)** **v** **ANDREW WILLSFORD** **(third party)**
FILE NO:	BS5581 of 2011
DIVISION:	Trial Division
PROCEEDING:	Applications for costs orders
DELIVERED ON:	27 November 2014
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions
JUDGE:	Mullins J
ORDER:	**1. The defendant must pay the first plaintiff's costs of the proceeding on the standard basis to and including 20 June 2012 and on the indemnity basis from 20 June 2012.** **2. The second plaintiff must pay the defendant's costs of the claim brought by the second plaintiff against the defendant on the standard basis.** **3. The defendant must pay the third party's costs of the proceeding on the standard basis to and including 25 February 2013 and on the indemnity basis from 25 February 2013.**
CATCHWORDS:	PROCEDURE – COSTS – RECOVERY OF COSTS – where judgment was given for the first plaintiff against the defendant in the sum of $675,203 – where in June 2012 the parties attended a compulsory conference – where the first plaintiff made a mandatory final offer of $350,000 plus costs – where the defendant made a mandatory final offer of nil – where the defendant submits that the first plaintiff's costs should be assessed on the standard basis – whether the first plaintiff's costs should be awarded on the standard or indemnity basis PROCEDURE – COSTS – RECOVERY OF COSTS – where

the second plaintiff's claim against the defendant for damages for loss of services was dismissed – where the appropriate method of calculating damages was clarified by *Barclay v Penberthy* after the commencement of the proceeding – whether it was unreasonable for the second plaintiff to pursue the claim against the defendant – whether the defendant's costs of the claim brought by the second plaintiff should be awarded on the standard or indemnity basis

PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – THIRD PARTIES – where the defendant's claim against the third party was dismissed – where in February 2013 the third party made a *Calderbank* offer which was not accepted by the defendant – where in May 2013 the third party made a formal offer to settle which was not accepted by the defendant – where the third party had been reasonable in his attempts to resolve the contribution claim made by the defendant – whether the third party's costs should be awarded on the standard or indemnity basis

Personal Injuries Proceedings Act 2002, s 36, s 39, s 40
Uniform Civil Procedure Rules 1999, r 353, r 360

Du Pradal & Anor v Petchell [2014] QSC 261, related
State of Queensland v Hayes (No 2) [2013] QSC 80, considered
Stewart v Atco Controls Pty Ltd (in Liq)(No 2) (2014) 88 ALJR 811; [2014] HCA 31, considered

COUNSEL: J B Rolls for the plaintiffs
J P Kimmins for the defendant
T W Quinn for the third party

SOLICITORS: Bennett & Philp Lawyers for the plaintiff
McCullough Robertson Lawyers for the defendant
Jensen McConaghy for the third party

[1] On 24 October 2014, I gave judgment for the first plaintiff against the defendant in the sum of $675,203, dismissed the second plaintiff's claim against the defendant, dismissed the defendant's claim against the third party, and published the reasons for judgment: *Du Pradal & Anor v Petchell* [2014] QSC 261 (the reasons).

[2] The parties agreed on a timetable for the filing of affidavits on the issue of costs and for the exchange of the written submissions on costs. The parties were agreeable for the issue to be determined on the basis of this further written material.

Offers to settle

[3] The first plaintiff issued a notice of claim pursuant to the *Personal Injuries Proceedings Act* 2002 (PIPA) on 16 March 2009. The first plaintiff and the defendant attended a compulsory conference on 20 June 2012 convened pursuant to s 36 of PIPA. (As the second plaintiff's claim was not an action for damages for

personal injuries, it was not regulated by PIPA, so that the second plaintiff's claim was not formally the subject of that conference.) At the conclusion of the conference the first plaintiff made a mandatory final offer pursuant to s 39 of PIPA to accept $350,000 plus costs in the compromise of this claim. The defendant's mandatory final offer to the first plaintiff was nil.

[4] Ms Houlihan, the first plaintiff's solicitor, in her affidavit filed on 5 November 2014 deposes to the fact that the first plaintiff's case as set out in the notice of claim did not alter from the issue of that notice of claim to the date of trial. Ms Houlihan notes that the solicitors for the defendant represented him in defending the criminal charge that arose out of the accident the subject of this proceeding and the criminal trial took place in March 2011. Ms Houlihan notes that both the first plaintiff and the third party gave evidence in the criminal trial and that evidence was consistent with the evidence given by them in the trial of this proceeding.

[5] On 26 November 2013 the first and second plaintiffs offered pursuant to r 353 of the *Uniform Civil Procedure Rules* 1999 (*UCPR)* that the defendant pay the first and second plaintiffs' claims in the total sum of $500,000 together with their costs on a standard basis.

[6] Ms Denning, the solicitor for the defendant, in her affidavit filed on 5 November 2014 exhibits the letter dated 6 May 2014 sent on behalf of the defendant and the third party to the plaintiffs' solicitors on a without prejudice basis, save as to costs, in which an offer was made to settle the quantum of the first and second plaintiffs' claims for damages in the sum of $400,000 which would leave liability and contributory negligence as the issues in dispute between the parties at the trial. That offer was not accepted by the plaintiffs.

[7] Although the third party responded on 13 August 2009 to the defendant's contribution notice dated 15 June 2009 pointing out the reasons why the defendant would not succeed against the third party, the third party made a *Calderbank* offer on 26 February 2013 to settle the third party claim for $50,000 all inclusive. The defendant did not accept that offer and made no counter offer. The third party made a formal offer to settle dated 21 May 2013 under the *UCPR* for $50,000 plus costs. That offer was also not accepted by the defendant and no counter offer was made.

Submissions of the parties

[8] The first plaintiff seeks an order that the defendant pay his costs on an indemnity basis, having regard to the defendant's failure to accept the mandatory offer made by the first plaintiff at the conclusion of the compulsory conference which was for an amount that was considerably less than that for which the first plaintiff ultimately obtained judgment. The first plaintiff relies on the fact that his case articulated in the PIPA notice of claim was consistent with his pleadings and the evidence given at the criminal trial. Under s 40(8) of PIPA, the court must, if relevant, have regard to the mandatory final offers in making a decision about costs and the first plaintiff's mandatory final offer should be treated as if it were a *Calderbank* offer. The first plaintiff concedes that it cannot rely on r 360 of the *UCPR* in respect of the offer to settle that was made on behalf of both the first and second plaintiffs, as the offer included the unsuccessful claim of the second plaintiff, but the offer under r 353 remains relevant to the exercise of the court's discretion on costs. It is submitted that the defendant had more than one opportunity to resolve the first

plaintiff's claim on terms more favourable than those of the ultimate judgment and the defendant's resistance to accepting an offer or engaging in any meaningful settlement offers resulted in a trial of five days plus submissions. The defendant should be sanctioned by an award of indemnity costs.

[9] The second plaintiff submits that there should be no order for costs in respect of the second plaintiff's claim. When the statement of claim including the claim on behalf of the second plaintiff was filed on 28 June 2011, there was authority that supported the articulation of the claim for loss of services as the employer's loss of profits. Many of the accounting reports on this aspect of the proceeding had been obtained prior to the publication of the High Court's decision in *Barclay v Pemberthy* (2012) 246 CLR 258 on 2 October 2012. That clarified the law on the method of assessing damages for loss of services. It therefore submits that it was not the conduct of the second plaintiff which brought about the circumstances that caused the second plaintiff's claim to fail and that there should be a departure from the usual order with respect to the payment of costs by an unsuccessful party with no order for costs being made in respect of the second plaintiff's claim.

[10] The defendant accepts that it must pay the first plaintiff's costs of the proceeding, but submits the costs should be assessed on the standard and not the indemnity basis. It is for the first plaintiff to show that an order for indemnity costs is warranted and the mandatory final offer made on 20 June 2012 is a relevant, but not a decisive consideration, in the exercise of the discretion to award costs on an indemnity basis.

[11] The defendant submits that the first plaintiff's costs should be assessed on a standard basis, as the evidence of Mr Randall was only opened on the fifth day of the trial, an unsigned statement from Mr Wood was provided by the first plaintiff to the defendant only on 28 May 2014, Sergeant Worrell's evidence regarding the use of the area where the incident occurred for diving was given first at trial, and Mr Bartley's evidence in relation to the area being used by divers was not opened. This evidence on the issue of the use of the relevant area by divers and snorkellers was the only independent evidence and was of significance. The defendant argues that the care schedules prepared by Mrs Du Pradal were first produced during the trial and Ms Coles' first report was dated 26 March 2013 which was nine months after the compulsory conference. In addition, the evidence of Ms De Campo in relation to the hourly rates of care was not provided until 11 June 2014.

[12] The submissions on behalf of the first plaintiff in response to the defendant's submissions include the issue about whether the area in which the accident occurred was a major boating channel (or an area used by recreational fishing vessels and divers) was raised by the allegation in the defence that the first plaintiff was snorkelling in a major boating channel. The defendant had located Mr Randall in endeavouring to establish (which was not the case) that the Spearsafe campaign had commenced by the time of the accident. As a result of the defendant deciding not to call Mr Randall, Mr Randall contacted the first plaintiff's solicitors on the fourth day of the trial and, it was as a result of that contact, he was called by the plaintiff. Mr Bartley was cross-examined in the committal proceeding relating to the prosecution of Mr Petchell by defence counsel instructed by the defendant's solicitors and answered in the affirmative when he was asked whether he had dived at the location at which the first plaintiff was run over. The evidence of the first plaintiff and the third party always supported the accident occurring at a popular

fishing and diving spot, as was shown by the fishing boats anchored on the day of the accident (paragraph [27] of the reasons). It was not surprising that other witnesses who were called who also had knowledge of that fact disclosed that in the course of their evidence. It was not "expert" evidence requiring disclosure.

[13] In relation to the claim for care, the first plaintiff concedes that Mrs Du Pradal's care schedules were not produced until the trial, but that the first plaintiff's case was always limited to the evidence of Ms Coles and her first report was dated 22 March 2013. Ms Houlihan deposes at paragraph 6 of her affidavit filed on 17 November 2014 that the claim for gratuitous care was a "constant theme" in the first plaintiff's claim against the defendant, being incorporated in the offer of settlement that accompanied the PIPA notice of claim delivered to the defendant's solicitors on 27 April 2011 that was supported by the medical opinion for the need to care referred to in the medical reports of Dr Gillett dated 15 October 2009, Dr Myers dated 20 August 2009 and Dr Campbell dated 2 September 2009. In addition, at the compulsory conference held on 20 June 2012 the schedule of damages sought on behalf of the first plaintiff that was tabled included a claim for past and gratuitous care in the amount of $236,000. Although the report of Ms De Campo was not provided until June 2014, her evidence was unremarkable, as it merely set out the commercial value of the care and those values are readily ascertainable.

[14] The defendant seeks an order that the second plaintiff pay its costs of the second plaintiff's unsuccessful proceeding against the defendant on the indemnity basis. The defendant submits that, in light of the conclusion at paragraph [143] of the reasons, the second plaintiff could not succeed as a matter of law on the basis of its pleaded claim for damages for loss of profits as a result of the loss of the services of the first plaintiff and could not succeed for a claim for the cost of replacement labour which it did not incur and had not pleaded, the second plaintiff's claim should never have been made or continued.

[15] The third party submits the defendant should pay his costs on the standard basis to and including 25 February 2013 and on the indemnity basis from 26 February 2013 when the *Calderbank* offer was made. The defendant submits that, as the third party proceeding was reasonably commenced and pursued by the defendant, the defendant should be ordered to pay third party's costs on the standard basis only.

The first plaintiff's costs

[16] It can be inferred from the failure of the defendant to make any settlement offer to the first plaintiff that entailed the payment of damages to the first plaintiff and the conditions of the defendant's offer to settle the quantum that the defendant had formed the view that he had good prospects of defending the claim. That is the defendant's right, but it is accompanied by the risk that the forensic decision will not be vindicated.

[17] The mandatory final offer made by the first plaintiff is analogous to a *Calderbank* offer. The question is whether, in the circumstances of the conduct of this proceeding, the making of the mandatory final offer was a genuine and reasonable attempt to settle the proceeding and whether the defendant's failure to respond with any settlement offers was reasonable. See the discussion by Philippides J on the effect of a *Calderbank* offer in *State of Queensland v Hayes (No 2)* [2013] QSC 80 at [8]-[17].

[18] I was concerned that the statement of claim, as originally filed, did not include a claim for gratuitous care which was not added until the amended statement of claim was filed at the trial. That concern was eliminated when it became clear that a significant claim for gratuitous care (supported by evidence) was agitated at the compulsory conference on 20 June 2012 and the mandatory final offer made by the first plaintiff must have incorporated an amount for such a claim. There was no impediment to the statement of claim being amended at an appropriate time to reflect the claim. The calculation of the claim was further bolstered by the delivery of the first report of Ms Coles.

[19] The effect of a *Calderbank* offer was considered by the High Court recently in *Stewart v Atco Controls Pty Ltd (in Liq)(No 2)* (2014) 88 ALJR 811 at [4]:

> "The non-acceptance of a *Calderbank* offer is a factor, in some cases a strong factor, to be taken into account on an application for indemnity costs. The respondent submits that its rejection of the offer was not unreasonable. If that be the test, it would appear to require at the least that the respondent point to a reason for not accepting the offer beyond the usual prospects of being successful in litigation."

[20] The plaintiff had made full disclosure to the defendant of his case on liability from the outset of his notice of claim under PIPA. By the compulsory conference there was a plethora of medical reports supporting the plaintiff's claim for damages for the significant consequences for him of the accident. Even though the offer to settle by the first and second plaintiffs in November 2013 for $500,000 plus costs could not count as an offer to settle under the *UCPR*, the first plaintiff evinced a willingness to negotiate a settlement after Ms Coles' first report was provided to the defendant that would have been beneficial to the defendant, if the first plaintiff's claim had been limited to $500,000. In the circumstances, I am not convinced the defendant's failure to respond to the first plaintiff's mandatory final offer by making any real settlement offer to the first plaintiff was reasonable. The discretion to make an award of costs on the indemnity basis should be exercised from the making of the very reasonable mandatory final offer by the first plaintiff on 20 June 2012 to which there was no reasonable response by the defendant.

The second plaintiff's claim

[21] The starting point for determining the order for costs in relation to the unsuccessful claim by the second plaintiff is that costs should follow the event. The position on the method of calculating damages for the loss of services may not have been as clear at the commencement of the proceeding, as it was after the decision in *Barclay*. I am not satisfied that the failure of the second plaintiff to discontinue or otherwise seek to resolve its claim against the defendant, when the first plaintiff's claim was proceeding to trial because of the refusal of the defendant to engage in a genuine settlement negotiation, justifies ordering the costs in favour of the defendant in respect of the second plaintiff's claim on the indemnity basis.

The third party's costs

[22] The third party was more than reasonable in his attempts to resolve the contribution claim made by the defendant. The defendant had the advantage of a rehearsal of the third party's evidence at the criminal trial and an early indication of the reasons for

which the third party denied liability and with which the third party's case remained consistent. Neither the *Calderbank* offer nor the offer to contribute made by the third party to the defendant mandate an order for costs in the third party's favour on an indemnity basis, but the offers are relevant factors to take into account in determining the appropriate costs order between the defendant and the third party. In the circumstances where the defendant had made the decision to take at least the question of his liability to the first plaintiff at trial and failed therefore to make any offer himself to settle the third party's claim despite the third party's attempt to do so, it is appropriate to order that the third party recover his costs from the defendant on the indemnity basis from the time the *Calderbank* offer was made on 25 February 2013.

Orders

[23] The defendant submits that if costs are awarded against the second plaintiff in favour of the defendant, those costs be set off against the costs which the defendant is ordered to pay the first plaintiff, because of the relationship between the claims by the first and second plaintiffs.

[24] As the claim by each of the first and second plaintiffs was based on a separate cause of action with a different result, it is appropriate that separate costs orders be made in respect of each of the claims. The fact that the first plaintiff is a director and shareholder of the second plaintiff is not a reason to treat the plaintiffs interchangeably. I refuse to make the order of set off sought by the defendant.

[25] It follows that the orders for costs will be:

1. The defendant must pay the first plaintiff's costs of the proceeding on the standard basis to and including 20 June 2012 and on the indemnity basis from 20 June 2012.
2. The second plaintiff must pay the defendant's costs of the claim brought by the second plaintiff against the defendant on the standard basis.
3. The defendant must pay the third party's cost of the proceeding on the standard basis to and including 25 February 2013 and on the indemnity basis from 25 February 2013.