SUPREME COURT OF QUEENSLAND

CITATION:	*Commonwealth Bank of Australia v Dalle Cort & anor* [2015] QSC 41
PARTIES:	**COMMONWEALTH BANK OF AUSTRALIA** (plaintiff) **v** **GILDO CHRISTOPHER DALLE CORT** (first defendant) and **ANTONETTA GABRIELLA DALLE CORT** (second defendant) **GILDO CHRISTOPHER DALLE CORT and ANTONETTA GABRIELLA DALLE CORT** (plaintiffs by counterclaim) **v** **COMMONWEALTH BANK OF AUSTRALIA** (first defendant by counterclaim) and **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (second defendant by counterclaim)
FILE NO/S:	BS9290/14
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	6 March 2015
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Carmody CJ
ORDERS:	**Orders as per signed drafts dated 19 February 2015.**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON AN INDEMNITY BASIS – where the plaintiff had a contractual right to recover all costs in a proceeding relating to the disputed contract – where defendants' conduct in the proceedings was unreasonable – where there were no real prospects of success on the counterclaim advanced against the second defendant by counterclaim – where the second defendant by counterclaim made a Calderbank offer, an offer under Chapter 9 Part 5 UCPR, and on several occasions drew the defendants' attention to the inadequacy of the pleadings –

whether the plaintiff and the second defendant by counterclaim are entitled to recover costs on the indemnity basis

Uniform Civil Procedure Rules 1999 (Qld), rr 361, 681(1)

Colgate-Palmolive Co & Anor v Cussons Pty Limited (1993) 46 FCR 225, considered
Chaina v Alvaro Homes Pty Ltd [2008] NSWCA 353, cited
Clark v Commissioner of Taxation [2010] FCA 415, cited
Eric Preston Pty Ltd v Euroz Securities Ltd (No 2) [2010] FCA 1068, considered
Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd (1988) 81 ALR 397, followed
Gomba Holdings (UK) Limited v Minories Finance Limited [1993] Ch 171, cited
Huntsman Chemical Co Australia Ltd v International Pools Australia Pty Ltd (1995) 36 NSWLR 242, distinguished
J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WA Branch) (No 2) (1993) 46 IR 301, cited
Oshlack v Richmond River City Council (1998) 193 CLR 72, considered
Tickell v Trifleska Pty Ltd (1990) 25 NSWLR 353, considered

COUNSEL: Matter heard on the papers.

SOLICITORS: HWL Ebsworth for the plaintiff, first defendant by counterclaim.
Bosscher Lawyer Commercial for the defendants, plaintiffs by counterclaim.
Moray Agnew for the second defendant by counterclaim.

[1] These applications are both for indemnity costs and are brought by the plaintiff ("CBA") and the second defendant by counterclaim ("ASIC") in these proceedings. On 5 December 2014 summary judgment was ordered against the defendants ("the Dalle Corts") in favour of CBA and ASIC and, subject to limited leave to replead against CBA only, the counterclaim was struck out. The Dalle Corts have not filed an amended counterclaim within time. Nor have they responded to these applications in the time allowed, despite being served with the relevant material and submissions.

[2] It is trite to state that costs follow the event.[1] The baseline presumption in the present case is that the Dalle Corts ought to pay each of CBA and ASIC's costs of the proceedings[2] and of the applications. Departure from this principle requires compelling reasons and clear justification. Whether the discretion to award costs on the indemnity basis should be exercised depends on the circumstances of the case.

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1 *Uniform Civil Procedure Rules* 1999 (Qld) r 681(1); *Oshlack v Richmond River City Council* (1998) 193 CLR 72 at 97 per McHugh J; [1998] HCA 11 at [67].

2 As the defendants sought to avoid enforcement of CBA's claim by raising a counterclaim and alleging equitable set-off the costs associated with the defence of the counterclaim arise out of the claim.

CBA

[3] The terms and conditions of the Better Business Loan ("the BBL") enforced against the Dalle Corts in these proceedings relevantly provide[3] that, as borrowers, they are to pay CBA all amounts it is charged, charges, pays or incurs in connection with the exercise or enforcement of any rights, power, claim or remedy of any kind arising out of the BBL. I accept that CBA's fees and charges under the BBL include legal costs (both solicitor and client and party and party).

[4] A contractual right to indemnity should ordinarily be given effect.[4] In the present case this proposition is strengthened by the additional factors relied on by CBA as favouring indemnity assessment, namely that:

(a) the defendants' pleaded defences did not raise triable issues;
(b) despite lengthy notice of the application for summary judgment the defendants did not amend their defence;
(c) on the hearing of the application new legal representation for the defendants unsuccessfully raised the possible defence of equitable set-off;
(d) the counterclaim was fatally defective;
(e) the claims of conspiracy and breach of confidentiality were devoid of merit.

ASIC

[5] ASIC submits that the Dalle Corts' litigation conduct was so unreasonable that the "special or unusual feature" test in *Colgate-Palmolive Co & Anor v Cussons Pty Limited* is satisfied and thus in all of the circumstances the court should depart from the ordinary practice and exercise its discretion to order payment of its costs of the whole proceedings on the indemnity basis.[5] ASIC further submits that such an order would be consistent with the "broader policy directed to limiting the litigation of cases where there are no reasonable prospects of success" identified in *Chaina v Alvaro Homes Pty Ltd.*[6]

[6] ASIC points to the following conduct in support of its submission:

(a) The defendants unreasonably and unnecessarily prolonged the proceedings by making numerous futile amendments to their counterclaim;[7]
(b) All three versions of the counterclaim pleaded a hopeless case;
(c) The third iteration completely recast the alleged causes of action against ASIC;
(d) Serious allegations of public misfeasance were made against ASIC and its officers without any proper foundation.[8]

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3 Affidavit of I Stevens filed 25 August 2014, CFI-24, Ex IS-1, p 45

4 *Gomba Holdings (UK) Limited v Minories Finance Limited* [1993] Ch 171 at 194B; cited approvingly in *MID Australia Pty Ltd v Around Australia Pty Ltd* [2005] QSC 91 at 22 per McMurdo J.

5 See *Colgate-Palmolive Co & Anor v Cussons Pty Limited* (1993) 46 FCR 225 at 233-234.

6 [2008] NSWCA 353 at [111]; cited by Martin J in his Honour's discussion of "the development of a less confined approach to the award of indemnity costs" in *The Beach Retreat Pty Ltd v Mooloolaba v Mooloolaba Marina Ltd* [2009] 2 Qd R 356 at 384-386.

7 Cf. *Qantas Airways Ltd v Dillingham Corporation Ltd* (unrep, 14/5/87, NSWSC).

8 Cf. *Maule v Liporoni (No 2)* (2002) 122 LGERA 216 at 229 [42].

[7] ASIC further submits that despite the flimsiness of their case the Dalle Corts imprudently and unreasonably rejected two clear and reasonable settlement offers made by ASIC at an early stage in the proceedings based on each party walking away and bearing their own costs, and which would have saved ASIC from incurring significant legal fees. The first offer was made pursuant to Chapter 9 Part 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") on 20 November 2013 shortly after Moray & Agnew was appointed to act for ASIC.[9] The second was a Calderbank offer made on 6 February 2014.[10] An offer under the Rules is, unless the court orders otherwise, presumed to give rise to an entitlement to indemnity costs where the offeror achieves a better outcome than was offered,[11] whereas in the case of a Calderbank offer, the grant of indemnity costs is within the court's discretion. It is for the offeror to demonstrate that the relevant refusal was unreasonable.[12]

[8] Offers of settlement, either informal or under the UCPR, must reflect a genuine attempt to compromise. Even where the offeror is completely successful in litigation, an offer requiring complete capitulation will not generally satisfy this requirement.[13] However, a "walk away" offer may be genuine where the offer involves the sacrifice of substantial recoverable costs. In *Clark v Commissioner of Taxation*, for example, the costs that would have been sacrificed if the offer was accepted totalled between $123,000 and $184,000.[14] A walk away offer made late in proceedings, for example just before trial, is more likely to be considered reasonable because both parties will be fully aware of the strengths and weaknesses of their cases.[15]

[9] The offers were made at a relatively early stage after the ASIC proceedings were started, and well before the trial in the matter was set down.[16] Both offers were open for a period of 14 days[17] and rejected within ten days.[18] While both letters, as well as others sent by ASIC, outlined serious deficiencies in the pleadings, the defendants were not equipped to clearly and impartially assess the merits of their case, or lack thereof. Their responses show that they did not understand the nature of a "without prejudice" settlement offer.[19] No evidence has been led as to the legal costs incurred at the time of the offers, nor were the defendants appraised of that information at the time they were made.

[10] Although these factors would generally preclude a court from finding an offer to settle reasonable, the counterclaim's total lack of merit outweighs other

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9 Ex AEY-3 to the Affidavit of A E Yates sworn 17 December 2014.

10 Ex AEY-6 to the Affidavit of A E Yates sworn 17 December 2014.

11 *Uniform Civil Procedure Rules* 1999 (Qld) r 361.

12 *CGU Insurance Ltd v Corrections Corporation of Australia Staff Superannuation Ltd* [2008] FCAFC 173 at [75] per Moore, Finn and Jessup JJ.

13 See e.g. *Tickell v Trifleska Pty Ltd* (1990) 25 NSWLR 353 at 355 per Rogers CJ; *Mitchell v Pacific Dawn Pty Ltd* [2003] QSC 179 at [29] per Ambrose J.

14 *Clark v Commissioner of Taxation* [2010] FCA 415 at [90].

15 *Eric Preston Pty Ltd v Euroz Securities Ltd (No 2)* [2010] FCA 1068 at [16].

16 See affidavit of A E Yates sworn 17 December 2014 at [8], [18], [19], [22].

17 Cf. *McDevitt v Irwin* [2005] ACTSC 133 at [16] per Harper M; *Brymount Pty Ltd v Cummins (No 2)* [2005] NSWCA 69 at [20] per Beazley JA, Ipp and McColl JA agreeing.

18 ASIC's Outline of Submissions on Costs at 2; Exs AEY-3, AEY-4, AEY-6 and AEY-7 to the Affidavit of A E Yates sworn 17 December 2014 (which evidence that the Dalle Corts' reply to the first offer, contained at ex AEY-4, is dated one day after the offer but was sent by email ten days after the offer was made).

19 Ex AEY-4 to the Affidavit of A E Yates sworn 17 December 2014 at 22.

considerations concerning the appropriateness of indemnity costs. I would adopt the comments of Woodward J in *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd*:

> [I]t is appropriate to consider awarding 'solicitor and client' or 'indemnity' costs, whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law. Such cases are, fortunately, rare. But when they occur, the court will need to consider how it should exercise its unfettered discretion.[20]

[11] I would also adopt the statement of French J (as his Honour then was) in *J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WA Branch) (No 2),*[21] where his Honour said that to enliven the discretion to award indemnity costs "[i]t is sufficient … that, for whatever reason, a party persists in what should on proper consideration be seen to be a hopeless case."[22] In the present case, the claims advanced by the defendants against ASIC were unreasonable and had no prospects of success. Had they sought legal advice this would have been clear. The offers of settlement were reasonable in the particular circumstances of the case. Both offers explicitly foreshadowed an application for indemnity costs in the event of rejection.[23]

Conclusion

[12] The respondents' conduct in the proceedings was unreasonable in the relevant sense. They should have known they had no real defence to CBA's claim or any legally sustainable counterclaim. There is no reason why CBA's contractual indemnity or ASIC's prima facie entitlement to indemnity costs arising from the offer pursuant to Chapter 9 Part 5 of the UCPR should not be given effect. The unreasonableness of the litigation conduct and the rejection of the later Calderbank offer strengthens ASIC's claim to indemnity costs on the whole of the action. In the circumstances, therefore, I consider it appropriate that the defendants pay CBA and ASIC their costs of the proceeding assessed on the indemnity basis.

Orders

[13] Orders as per signed drafts dated 19 February 2015.

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20 (1988) 81 ALR 397 at 410.

21 (1993) 46 IR 301.

22 Ibid at 303.

23 Cf. *Huntsman Chemical Co Australia Ltd v International Pools Australia Pty Ltd* (1995) 36 NSWLR 242.