SUPREME COURT OF QUEENSLAND

CITATION:	*McAndrew v AAI Limited (No 2)* [2013] QSC 317
PARTIES:	**TROY ROBERT McANDREW** (plaintiff) **v** **AAI LIMITED** (defendant)
FILE NO/S:	SC No 254 of 2012
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	14 November 2013
DELIVERED AT:	Rockhampton
HEARING DATE:	On the papers
JUDGE:	McMeekin J
ORDER:	**1. That the defendant pay the plaintiff's costs on the standard basis incurred up to and including 24 September 2013 and thereafter the plaintiff pay the defendant's costs on the standard basis**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – CONDUCT OF PARTIES – DEMAND, OFFER AND CONSENT – where defendant made a *Calderbank* offer to plaintiff on 20 September 2013 – where plaintiff rejected offer – where three day trial commenced on 24 September 2013 - where judgment was found in favour of plaintiff - where the offer was more advantageous to the plaintiff than the eventual judgment – whether the general rule be followed that costs should follow the event *Uniform Civil Procedure Rules* 1999 (Qld), r681 *Calderbank v Calderbank* [1975] 3 All ER 333, cited *Commonwealth v Gretton* [2000] NSWCA 118, cited *Elite Protective Personnel v Salmon* [2007] NSWCA 322, cited *Evans Shire Council v Richardson (No 2)* [2006] NSWCA 61, cited *Jones v Bradley (No 2)* [2003] NSWCA 258, cited

	Jones v Millward [2005] 1 Qd R 489, cited
	Lawes v Nominal Defendant [2007] QSC 103, cited
	Leichardt Municipal Council v Green [2004] NSWCA 341, cited
	Northbound Property Group Pty Ltd ACN 111 393 894 v Peter Carosi and Ors (No 2) [2013] QSC 189, cited
	State of Queensland v Hayes (No 2) [2013] QSC 80, cited
	Vagg v Mcphee (No 2) [2012] NSWSC 187, cited
COUNSEL:	Mr GC O'Driscoll for the Plaintiff
	Mr GF Crow QC with him Mr A Arnold for the Defendant
SOLICITORS:	Murphy Schmidt Solicitors for the Plaintiff
	Jensen McConaghy Solicitors for the Defendant

[1] **McMeekin J:** On 25 October 2013 I gave judgment for the plaintiff in the sum of $1,420,209.60 after a trial. I gave leave to the parties to make submissions on costs. The parties have not agreed on the appropriate order.

[2] A costs order is, of course, discretionary but in the normal course should follow the event: r681 *Uniform Civil Procedure Rules* 1999 ("UCPR"). Here the plaintiff succeeded to a substantial judgment. In the normal course the plaintiff should receive his costs. The debate is as to whether that normal course should be followed here.

[3] The trial commenced on 24 September 2013. On 20 September 2013, the Friday before the commencement of the trial, the defendant offered to settle the action by the payment to the plaintiff of the sum of $1.5 million clear of the payments already made to the plaintiff by the defendant. The offer was said to be made in accordance with the principles expressed in *Calderbank v Calderbank* [1975] 3 All ER 333. The judgment sum, on the same basis, was $1,420,209.60. Hence the offer was more advantageous to the plaintiff than the eventual judgment by $79,790.40.

[4] The plaintiff submits that the offer should have no effect on the appropriate costs order as the offer was made late on a Friday, and only one business day prior to trial, and the plaintiff was given effectively 30 minutes in which to consider it before the offer expired. That afforded the plaintiff no reasonable opportunity to consider and deal with the offer, a necessary pre-condition: see *Elite Protective Personnel v Salmon* [2007] NSWCA 322 at [99]. It is further submitted that the offer should be viewed not as an attempt to reach a negotiated settlement but merely a trigger for a costs sanction: see *Leichardt Municipal Council v Green* [2004] NSWCA 341 at [39] per Santow JA.

[5] The defendant submits that the effect of the offer should be that the plaintiff should receive his costs up until the date of the offer but that the plaintiff should pay the defendant's costs thereafter. The defendant points out that:

(a) the offer was made by way of a *Calderbank* letter at 3:15 pm, open until 4:30 pm initially, and that time was extended to enable instructions to be taken. The offer was rejected at 5:10 pm;

(b) at the time the offer was made all relevant facts were well known to both parties;

(c) prior to the making of the offer the plaintiff had indicated by his counsel a potential willingness to accept an offer of $1,500,000;[1]

(d) had the offer been accepted the costs of a three-day trial would have been avoided;

(e) the offer was the last in a series of offers made by the defendant (16 May 2012, 21 May 2013, 29 August 2013 and 20 September 2013) the defendant having effectively to bid against itself as the plaintiff would not shift from an offer made in February 2013. The offers included a formal offer of $1.35 million made on 29 August 2013 and an informal offer of $1.425 million made on the afternoon of 20 September 2013.

[6] I am conscious that rules 360 and 361 UCPR provide for a period of 14 days within which to consider an offer. It might be thought that the rules set the period which, *prima facie*, is a reasonable one for the consideration of an offer. Normally that might be so. But the circumstances here are somewhat out of the ordinary.

[7] While the plaintiff had only a limited time within which to consider the offer made here, that must be judged against a background of the plaintiff having had access to expert legal advice going to the value of his claim over the months prior to the trial and with no material change in circumstances as the trial date approached. In saying that, I am conscious of the plaintiff's attempts to gather fresh expert opinion recalculating aspects of his claim. As I explained in my reasons for judgment that fresh expert opinion was unhelpful and in my view should not reasonably have affected the plaintiff's assessment of his case.

[8] I note that no extension of time was sought to consider the offer. Equally it might be said that the defendant did not seek to extend the time to allow more leisurely consideration. One difficulty is that both parties had to prepare for trial which here involved travelling to Rockhampton and organising numerous witnesses, some of whom also had to travel. Time was of the essence. And significantly the plaintiff did not simply let the offer lapse but rather rejected the offer. That suggests strongly that enough time was available on the Friday afternoon for the plaintiff to make a considered decision, and that he made his decision presumably with his counsel's and solicitor's advice available.

[9] As well, there is the peculiarity that the plaintiff had, by his counsel, indicated a potential willingness to accept the amount eventually offered by the defendant. That willingness was first indicated on 29 August 2013. As the plaintiff points out those discussions were informal but, plainly, the plaintiff's side had made much the same assessment of the value of the case as did the defendant's side.

[10] I have previously held,[2] and no submission is made here that I was wrong, that the relevant principles that apply to a *Calderbank* offer may be summarised as:

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[1] See the email of 29 August 2013 (Ex MEH01 to Mr Holmes' affidavit) and informal discussions to the same effect on 20 September

(a) The onus falls on the offeror (here the defendant) to convince the court that it should exercise its discretion in its favour, the offeree having acted unreasonably or imprudently in rejecting the offer: see *Lawes v Nominal Defendant* [2007] QSC 103; *Jones v Bradley (No 2)* [2003] NSWCA 258; *Evans Shire Council v Richardson (No 2)* [2006] NSWCA 61 per Giles, Ipp and Tobias JJA at [26].

(b) The offeror must also show that the offer involved some element of compromise: see *Jones v Millward* [2005] 1 Qd R 489;

(c) The court strives to achieve fairness in the result: see the discussion in *Commonwealth v Gretton* [2000] NSWCA 118.[3]

[11] There is no suggestion here that the offer did not involve an element of compromise. The increase in the defendant's offers was of the order of $150,000 over the weeks leading up to trial. I cannot see why the offer should be characterised as anything but a genuine attempt at compromise, particularly given the earlier intimation. That there might be cost consequences follows from virtually every offer made in the course of litigation.

[12] The question is whether the rejection of the *Calderbank* offer was unreasonable or imprudent. In summary the defendant had provided several offers to conclude the matter, the plaintiff had expert legal advice available over the months leading up to trial with no significant change in circumstances, an amount at the level eventually offered had been at least contemplated by the plaintiff as a potential outcome in the past, the increase in the offer was substantial involving significant compromise, and there seems to have been sufficient time to consider his position with the help of expert legal advice and there was a considered decision to reject the offer. It is against this background that the question must be judged.

[13] In my view these various factors lead to the conclusion that the plaintiff acted unreasonably or imprudently in rejecting the offer. As the defendant submits, even as late as the day before trial there is a public and private interest in settling disputes.[4] Costs here could, and should, have been avoided.

[14] In my view there is good reason to depart from the usual approach. A fair result is that the plaintiff be responsible for the costs after the first day of trial. I choose the end of the first day of trial as the cut-off conscious that many costs of that day are already incurred and cannot be avoided with so late an offer.

[15] I order that the defendant pay the plaintiff's costs on the standard basis incurred up to and including 24 September 2013 and thereafter the plaintiff pay the defendant's costs on the standard basis.

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2 *Northbound Property Group Pty Ltd ACN 111 393 894 v Peter Carosi and Ors (No 2)* [2013] QSC 189

3 And see *Vagg v Mcphee (No 2)* [2012] NSWSC 187 per Schmidt J at [18]

4 See the comprehensive review of the relevant principles by Philippides J in *State of Queensland v Hayes (No 2)* [2013] QSC 80 at [7] – [17]