SUPREME COURT OF QUEENSLAND

CITATION:	*2040 Logan Road Pty Ltd v Body Corporate for Paddington Mews CTS 39149* (No 2) [2016] QSC 65
PARTIES:	**2040 LOGAN ROAD PTY LTD** (Applicant) **v** **BODY CORPORATE FOR PADDINGTON MEWS CTS 39149** (Respondent)
FILE NO/S:	SC No 11223 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers – Written submissions on behalf of the respondent dated 21 March 2016; Written submissions on behalf of the applicant dated 22 March 2016; Supplementary written submissions on behalf of the respondent dated 24 March 2016
JUDGE:	Burns J
ORDER:	**The order of the court is that the applicant shall pay the respondent's costs of and incidental to the proceeding, including reserved costs, calculated on the standard basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – OFFERS OF COMPROMISE, PAYMENTS INTO COURT AND SETTLEMENTS – INFORMAL OFFERS AND CALDERBANK LETTERS – UNREASONABLE REFUSAL OF OFFER – where application was made to the court pursuant to s 180 of the *Property Law Act* 1974 (Qld) for the grant of an easement – where an offer of compromise was made by the respondent at an early stage of the proceeding – whether the applicant acted unreasonably or imprudently in not accepting that offer – whether costs calculated on the indemnity basis should be ordered PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – RELEVANT CONSIDERATIONS GENERALLY – where

application was made to the court pursuant to s 180 of the *Property Law Act* 1974 (Qld) for the grant of an easement – whether the applicant's conduct of the case was plainly unreasonable – whether there was some special or unusual feature of the case that justified a departure from the usual rule that the costs of a successful party are to be calculated on the standard basis – whether costs calculated on the indemnity basis should be ordered

Property Law Act 1975 (Qld) s 180

Uniform Civil Procedure Rules 1999 (Qld) r 361, r 681

2040 Logan Road Pty Ltd v Body Corporate for Paddington Mews CTS 39149 [2016] QSC 40
Colgate Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225
Di Carlo v Dubois & Ors [2002] QCA 225
Emanuel Management Pty Ltd (in liq) & Ors v Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors [2003] QSC 299
Graham and Anor v Murphy & Anor [2013] QSC 21
Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) [2005] 13 VR 435
J & D Rigging Pty Ltd v Agripower Australia Limited & Ors [2014] QCA 23
Martinovic v Chief Executive, Qld Transport & Anor [2005] QCA 55; [2005] 1 Qd R 502
Paroz v Paroz & Ors [2010] QSC 157
Rouse v Shepherd (No 2) (1994) 35 NSWLR 277
Smits v Tabone; Blue Coast Yeppoon Pty Ltd v Tabone [2007] QCA 337
Tector v FAI General Insurance Company Limited [2000] QCA 426; [2001] 2 Qd R 463
Todrell Pty Ltd v Finch & Ors; Croydon Capital Pty Ltd v Todrell Pty Ltd & Anor [2007] QSC 386; [2008] 2 Qd R 95
Tran & Anor v Cowan & Ors [2006] QSC 162
Trevisin & Anor v Julatten Developments Pty Ltd [2012] QSC 393

COUNSEL:	MD Martin QC for the applicant APJ Collins for the respondent
SOLICITORS:	Mills Oakley Lawyers for the applicant Craig Ray & Associates for the respondent

[1] The applicant, 2040 Logan Road Pty Ltd, applied to the court pursuant to s 180 of the *Property Law Act* 1974 (Qld) for the grant of an easement over part of the common property of the respondent, Body Corporate for Paddington Mews CTS 39149. On 7

March 2016, that application was dismissed.[1] What must now be decided is the question of costs.

[2] The applicant accepts that costs, including reserved costs, should follow the event,[2] but argues that there is no good reason why costs should be ordered to be calculated on other than the usual, standard basis. The respondent, on the other hand, contends for assessment on the indemnity basis. That is the issue for determination.

[3] By s 180(5)(e) PLA, power is conferred on the court to make orders in respect of the costs of the proceeding generally. Section 180(6) PLA then goes on to provide that the court shall not, except in special circumstances, make an order for costs against a servient owner.[3] That provision of course does not apply because the respondent, as servient owner, has been wholly successful. Rather, the respondent relies on the general power conferred by s 180(5)(e) PLA to seek an order for costs calculated on the indemnity basis, and there can be no doubt that such an order can be made in a proceeding pursuant to s 180 PLA provided it is appropriate to do so.

[4] However, such an award will only be appropriate where it is positively demonstrated that the conduct of the party against whom the order is sought is plainly unreasonable or that there is some special or unusual feature of the case that justifies a departure from the usual rule that the costs of a successful party are to be calculated on the standard basis.[4] When considering such questions, reference is often made to the variety of circumstances set out in the judgment of Shepherd J in *Colgate Palmolive Company & Anor v Cussons Pty Ltd*[5] or in subsequent decisions that have followed a similar approach.[6] Although the several circumstances highlighted in these cases to warrant an order for indemnity costs were not intended to cover the field, they supply useful guidance. Thus, where:

(a) allegations of fraud are made knowing them to be false or irrelevant;

(b) evidence of particular misconduct causes the loss of time to the court and the other parties;

(c) the proceeding was commenced for some ulterior motive;

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1 *2040 Logan Road Pty Ltd v Body Corporate for Paddington Mews CTS 39149* [2016] QSC 40.

2 *Uniform Civil Procedure Rules* 1999 (Qld) r 681.

3 See, eg, *Tran & Anor v Cowan & Ors* [2006] QSC 162, where special circumstances were found to exist of such a degree as to justify the ordering of costs against the servient owner calculated on the indemnity basis.

4 *Tector v FAI General Insurance Company Limited* [2000] QCA 426 at [5]; [2001] 2 Qd R 463 at 464 [5]. See also *Todrell Pty Ltd v Finch & Ors; Croydon Capital Pty Ltd v Todrell Pty Ltd & Anor* [2007] QSC 386 at [4]; [2008] 2 Qd R 95 at 96 [4] where Chesterman J put the test in a slightly different way, that is, whether there was "something irresponsible about the conduct of the losing party which exposed its opponent to costs that should, in fairness, be ordered on an indemnity basis".

5 (1993) 46 FCR 225 at 233 – 234.

6 For example, *Rouse v Shepherd (No 2)* (1994) 35 NSWLR 277 at 279 – 280; *Di Carlo v Dubois & Ors* [2002] QCA 225; *Emanuel Management Pty Ltd (in liq) & Ors v Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors* [2003] QSC 299; *Martinovic v Chief Executive, Qld Transport & Anor* [2005] QCA 55 at [22]; [2005] 1 Qd R 502 at 510 – 511 [22]; *Smits v Tabone; Blue Coast Yeppoon Pty Ltd v Tabone* [2007] QCA 337; *Paroz v Paroz & Ors* [2010] QSC 157; *Graham and Anor v Murphy & Anor* [2013] QSC 21 at [83].

(d) the proceeding was commenced in wilful disregard of known facts or clearly established law;

(e) allegations are made that ought never to have been made;

(f) the case is unduly prolonged because of groundless contentions;

(g) the losing party, properly advised, should have known there was no chance of success;

(h) the court's processes have been abused in the sense that the court's time, and the litigants' money, has been wasted on a frivolous or unjustified proceeding; or

(i) there has been an imprudent refusal of an offer to compromise;

the court may conclude in favour of an award of costs assessed on an indemnity basis. Of course, in all cases, costs are in the discretion of the trial judge and the mere presence of one or more of these recognised circumstances does not give rise to an automatic entitlement to indemnity costs. All of the circumstances of the case must be considered to determine whether such an order should be made, and it would be wrong in principle to focus solely on the conduct of the case by the losing party.

[5] Where an offer to compromise a proceeding in terms more favourable than the eventual outcome has been made and refused, the following statement of principle from the Court of Appeal in *J & D Rigging Pty Ltd v Agripower Australia Limited & Ors*[7] will be apposite:

> "The failure to accept a *Calderbank* offer is a matter to which a court should have regard when considering whether to order indemnity costs. 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. The party seeking costs on an indemnity basis must show that the party acted 'unreasonably or imprudently' in not accepting the *Calderbank* offer."[8] (Citations omitted)

[6] In considering whether the rejection of a *Calderbank* offer was unreasonable or imprudent, the court should ordinarily have regard to the stage of the proceeding at which the offer was received; the time allowed to the offeree to consider the offer; the extent of the compromise offered; the offeree's prospects of success, assessed as at the date of the offer; the clarity with which the terms of the offer were expressed; and whether an application for indemnity costs was foreshadowed in the event that the offeree rejected the offer.[9]

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7 [2014] QCA 23.

8 At [5].

9 *J & D Rigging Pty Ltd v Agripower Australia Limited & Ors* [2014] QCA 23 at [6], adopting the criteria laid down by the Victorian Court of Appeal in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] 13 VR 435 at 441 [20].

[7] In this case, the respondent pointed to the rejection of a *Calderbank* offer that it made on 18 December 2014 as well as to several aspects of the conduct of the case by the applicant in support of its argument that costs should be ordered to be calculated on an indemnity basis. In support of its argument, the respondent sought to rely on an affidavit sworn by its solicitor by which various features of the litigation were sought to be proved.

[8] The applicant objected to the solicitor's affidavit being considered by the court and, to that end, advanced three grounds: (1) that no order had been made for the filing of further material, (2) that it was not consulted before the affidavit was filed and (3) that portions of the affidavit were irrelevant or largely so. It is true that no direction was made for the filing of material to support the submissions on costs but, had such a direction been sought, it would have been made. This is because, consistently with the principles discussed above, all of the circumstances of the conduct of the litigation are potentially relevant to the question at hand and an affidavit going to the proof of such matters may be received by the court. That, however, is not to say that the respondent was entitled to advance the affidavit to the court without first giving the applicant an opportunity to be heard. The proper course was to provide a copy of the affidavit to the applicant before it was filed together with a request for advice as to whether there was any objection to it being relied on by the respondent. Be that as it may, when the applicant learned that the respondent had advanced the affidavit, written submissions were made on its behalf against the reception of the affidavit and these were then responded to by supplementary written submissions from the respondent. On a consideration of the parties' respective submissions on this point, there is much force in the applicant's submissions about the lack of evidentiary value or relevance of much of what is deposed in, and exhibited to, the affidavit.[10] However, to the extent that the affidavit advances evidence of relevance to the issues discussed below, it will be received.

[9] I turn then to consider the bases advanced by the respondent for an award of indemnity costs.

[10] Dealing first with the *Calderbank* offer made by the respondent on 18 December 2014, although r 361 of the *Uniform Civil Procedure Rules* 1999 (Qld) is not in terms applicable to an application such as this, the court may nevertheless consider awarding costs on an indemnity basis when such an offer is made and rejected.[11] The respondent's offer was left open for acceptance until 31 January 2015 and was in terms that proposed a compromise of the proceeding on a "walk-away" basis. At the time when it was made, the body corporate for Cambridge Court was incorrectly named as the applicant and this remained the position until a substitution order was made by McMurdo J on 6 May 2015. The respondent submitted that, not only was its offer "entirely reasonable", it was made at an early stage of the proceeding[12] after the filing of affidavit material and the sending of correspondence that "clearly set out its position". For these reasons, the respondent submitted that the applicant had "unreasonably rejected" the offer.

[11] As earlier discussed, the respondent must show that the applicant acted unreasonably or imprudently in not accepting its offer. Various additional submissions were made in an

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10 Applicant's Submissions on Costs, pars 26 – 32.

11 *Trevisin & Anor v Julatten Developments Pty Ltd* [2012] QSC 393 at [7] per de Jersey CJ.

12 The proceeding was commenced on 24 November 2014.

attempt to support such a conclusion.[13] Among them were the propositions that the application was then incorrectly constituted and that the applicant's proposal was much broader than was ultimately pursued at the trial. Whilst those features cannot be gainsaid, at the time when the offer was made, the only material that had been filed was from lay deponents.[14] Apart from plans of survey, no expert evidence had yet been assembled. Importantly, in correspondence from the respondent's solicitors on 27 November 2014, the applicant had been asked to agree to a mechanism for the appointment of a traffic engineer and registered valuer to assess its proposal and, in the same letter, a request was made for the applicant to agree to:

> "[M]eet [the respondent's] reasonable costs of the review of the easement document with a view to then, subject to the advice being received from the experts referred to above, a Consent Order being put in place."[15]

[12] As such, the offer was made at a time when the application was not informed by expert evidence and, further, in circumstances where the respondent had, only three weeks before, signaled that it wished to investigate the applicant's proposal by reference to such evidence. Moreover, the possibility that the respondent might consent to an order under s 180 PLA was clearly flagged. Indeed, not much, if anything, changed to alter this picture during the period when the offer remained open for acceptance. That was hardly an approach that would have been effective to signal vociferous opposition to the application. It matters little that the proposal was considerably narrowed after the date of the offer or that the application was incorrectly constituted when it was made. If anything, the incorrect constitution of the proceeding meant that the offer was not strictly capable of being accepted by the present applicant although the taking of such a view would be to ignore that Mr Smith was at all times the guiding hand behind the litigation. Properly considered, the offer was an attempted "banker" on costs pending the further investigation of the applicant's proposal. I am therefore not at all persuaded that the applicant acted unreasonably or imprudently in not accepting the respondent's offer by 31 January 2015. In the applicant's assessment of its prospects of success, it was entitled to think, as was the fact, that its proposal was still under consideration. Of course, the position may well have been different had a "walk-away" offer been made on behalf of the respondent after it had completed its investigations including the taking of expert advice, but no such offer was ever made.

[13] The other basis for the respondent's argument was founded in various aspects of the applicant's conduct of the case. In this regard, it was submitted that the applicant had conducted its case "in a high-handed manner" by commencing the proceeding in the name of the wrong applicant, by advancing a broader proposal than was ultimately pursued, by failing to put its proposal in clear terms, by doing so without the consent of the body corporate for Cambridge Court and by holding the respondent to "its (financial) mercy" in circumstances where "it [continued] to alter its proposal". These submissions were then further developed in the respondent's written submissions.[16]

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13 Submissions on behalf of the Respondent on Costs, pars 7 – 15.

14 An affidavit from Mr Smith filed on behalf of the applicant on 24 November 2014 and an affidavit from Ms Wilson filed on behalf of the respondent on 15 December 2014.

15 Affidavit of AC Ray filed on 21 March 2016, Exhibit 2.

16 Submissions on behalf of the Respondent on Costs, pars 16 – 29.

[14] For the reasons I have already stated, I do not think that much turns on the incorrect constitution of the proceeding or the circumstance that the initial proposal was further refined by the end of the trial. Nor does it matter that the body corporate's consent was not obtained because it was not established at trial that this aspect of the matter had any real bearing on the outcome.[17] Of course, as the applicant's proposal changed, the respondent was forced to meet that changed case and, in the end, it successfully resisted the application. In part, that outcome was due to deficiencies in the applicant's final proposal and the evidence that went in support of it.[18] But the fact that the respondent was put to additional expense in meeting a changing case will not usually, without more, be a sufficient justification to award indemnity costs. In the first place, such a circumstance will often be seen to be present in litigation of any complexity and, in cases of this kind, it is not unusual for an applicant's initial proposal to be altered in an attempt to meet specific concerns expressed by the servient owner or its experts. It is also of some relevance to observe that the types of inefficiencies about which the respondent complains were hardly confined to the applicant's side of the record. For example, much time was taken up during the trial because the respondent pressed issues that could have only legitimately concerned the body corporate for Cambridge Court. Whether what was proposed was ultimately capable of meeting favour with the body corporate was really quite irrelevant to the court's assessment of the applicant's proposal unless it could be established that there was no realistic chance that consent would be forthcoming. The evidence in the case was never going to be capable of supporting such a conclusion, and the pursuit of this issue at trial was ultimately seen to be pointless.[19] Secondly, it was open to the respondent to seek to protect itself against any additional expense caused by changes in the applicant's case by the making of a later and effective *Calderbank* offer, but it chose not to do so.

[15] For completeness, it should be mentioned that some significance was also placed by the respondent on the features that the applicant was a "developer" who had "never intended to retain ownership of the two units the subject of the application" and that the respondent would be left out of pocket if an order for indemnity costs is not made. None of these features, even if correct, add anything of real substance to the question under consideration.

[16] In the end, I am not satisfied that the applicant's conduct of the litigation was so plainly unreasonable or may properly be regarded as so special or unusual as to justify a departure from the usual rule that the costs of a successful party are to be assessed on the standard basis.

[17] For these reasons, the applicant will be ordered to pay the respondent's costs of and incidental to the proceeding, including reserved costs, to be calculated on the standard basis.

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17 *2040 Logan Road Pty Ltd v Body Corporate for Paddington Mews CTS 39149* [2016] QSC 40 at 6 – 7 [15].

18 Ibid 4 – 5 [10], 9 – 10 [20] – [22].

19 Ibid 6 – 7 [15].