SUPREME COURT OF QUEENSLAND

CITATION:	*Yamaguchi v Phipps & Anor (No 2)* [2016] QSC 170
PARTIES:	**MINA YAMAGUCHI** (plaintiff) **v** **ROBERT WILLIAM FRANCES PHIPPS** (first defendant) and **QBE INSURANCE (AUSTRALIA) LIMITED** **ABN 78003191035** (second defendant)
FILE NO:	SC No 10061 of 2013
DIVISION:	Trial Division
PROCEEDING:	Further hearing on orders and costs
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 August 2016
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2016
JUDGE:	Applegarth J
ORDER:	**The second defendant pay the plaintiff her costs of and incidental to the proceeding to be assessed on the indemnity basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – OFFERS TO SETTLE UNDER RULES – where the defendant rejected the plaintiff's offer to settle made under the *Uniform Civil Procedure Rules* 1999 (Qld) ("*UCPR*") – where the plaintiff obtained at trial an order no less favourable than the offer – where rule 360, *UCPR* requires the Court to order costs on the indemnity basis unless the defendant can show another order is appropriate in the circumstances – whether the defendant has shown that another order is appropriate *Guardianship and Administration Act* 2000 (Qld) *Uniform Civil Procedure Rules* 1999 (Qld), r 359, r 360(1) *Motor Accident Insurance Act* 1994 (Qld), s 51C(10) *Bulsey v State of Queensland* [2016] QCA 158, cited *GEJ & MA Geldard Pty Ltd v Mobbs & Ors (No 3)* [2011] QSC 297, cited

Ross v Suncorp Metway Insurance Ltd [2002] QCA 93, cited
Yamaguchi v Phipps & Anor [2016] QSC 151, cited

COUNSEL:	S C Williams QC, with A J Williams, for the plaintiff G F Crow QC for the defendants
SOLICITORS:	MBA Lawyers for the plaintiff McInnes Wilson Lawyers for the defendants

[1] I published my reasons in this personal injury proceeding on 28 June 2016.[1] The parties were directed to confer in relation to the calculation of administration and management fees, and to submit draft orders based on my reasons. The parties have agreed orders, including the judgment sum and a further sum for administration and management fees, together with consequential orders in relation to the administration of monies that are to be held pursuant to the *Guardianship and Administration Act* 2000 (Qld). The only issue for me to decide is whether the plaintiff's costs of and incidental to the proceeding should be assessed on the standard or indemnity basis.

[2] The defendants' written submissions accepted that r 360(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) is engaged. As a result, I must order the plaintiff's costs on the indemnity basis "unless the defendant shows another order for costs is appropriate in the circumstances".

[3] In oral submissions the defendants submitted, however, that the formal offer made by the plaintiff dated 5 February 2016, which offered to settle the matter against the defendants by payment of the sum of $1,445,000 plus management and administration fees and costs and outlays on a standard basis, was defective and not a valid offer in accordance with the rules. The offer was made subject to the sanction of the Court. Reliance was placed by the defendants upon the fact that r 359 envisages that a person who is under a legal incapacity may make or accept an offer to settle under Part 5. The submission was made that if I considered that the plaintiff was under a legal incapacity then this was a valid offer. Reference then was made to evidence that the plaintiff had legal capacity, but not financial capacity. The argument advanced was that the plaintiff was not entitled to make an offer which was subject to the sanction of the Court because she did not fall within r 359.

[4] This argument was met by an oral submission that the offer was a valid one for someone who was under a financial incapacity, requiring any settlement to be subject to sanction. Expressly stating that the offer was subject to sanction was stating the obvious. Cases of this kind are often settled on the basis of the settlement being subject to the sanction of the Court. The defendants do not suggest that had the offer been accepted an application for a sanction would not have been made or a sanction not obtained. In the circumstances, I consider that the defendants' written submissions were correct to concede that r 360(1) is engaged.

[5] The defendants' opposition to costs being ordered on the indemnity basis rested principally on the proposition that the defendants were not in a position to reasonably consider the plaintiff's $1,445,000 offer at the time it was made and during the 14 days it remained open for acceptance because, at that time, neither the evidence nor the pleadings

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[1] *Yamaguchi v Phipps & Anor* [2016] QSC 151.

had settled. Reliance was placed upon the fact that on 4 February 2016 the plaintiff's solicitors had enclosed her proposed further amended statement of claim which increased the amount of her claim. The plaintiff's solicitors indicated that they intended to seek leave to amend on the first day of the trial. Leave was granted for the reasons which I gave on 7 March 2016. The defendants' costs submissions also focus upon the evidence of Ms Hague, which was the subject of debate at the start of the trial. Again, I will not repeat the contents of my ruling in that regard. Importantly, for present purposes, Ms Hague's report was provided to the defendants' solicitors at the end of November 2015. They had a few months to absorb its contents. They also had ample time to seek to have the plaintiff examined by another occupational therapist engaged by the defendants. They had the opportunity to raise questions concerning Ms Hague's evidence and her report at pre-trial reviews. They had the opportunity to alert the plaintiff to the fact that they opposed Ms Hague giving evidence. Instead, Ms Hague was included in the trial plans that were advanced by the parties prior to the trial.

[6] As for the amendments to the plaintiff's pleading, they were specified prior to the formal offer being made under the rules, and the amendments reflected the case which the plaintiff had foreshadowed in the form of witness statements, Ms Hague's report and the plaintiff's amended statement of loss and damage.

[7] It is unnecessary to repeat the contents of my reasons about the deterioration in the plaintiff's condition and the consequential increase in the amount of care she required. Her 2014 statement of loss and damage had claimed future care at 14 hours per week. Witness statements disclosed that she was receiving more care, and that it had increased to at least 28 hours per week by the date of trial. Ms Hague's report contained an annexure which tabulated these hours. The plaintiff's amended statement of loss and damage advanced a claim for future care on the basis of 28 hours per week.

[8] The defendants did not suggest that their formal offer dated 3 February 2016 of $1,000,000, together with administration fees and charges plus costs, was made without an appreciation of the upshot of the plaintiff's lay evidence and of Ms Hague's report concerning her need for care and the amount of actual care she had received from time to time. In addition, the defendants had long been in receipt of neuropsychological and other evidence proving the plaintiff's need for care.

[9] The final amendment to the plaintiff's pleading simply aligned her pleading with the evidence which had been disclosed to the defendants and with the amount claimed in her amended statement of loss and damage.

[10] During the first half of February 2016, during which time the defendants had an opportunity to consider the plaintiff's formal offer, they had the plaintiff's amended pleading and were on notice that the plaintiff intended to seek leave on the first day of the trial to make those amendments. They were in a position to assess the likelihood that the Court would grant leave to make those amendments so as to align the plaintiff's formal pleading with her evidence (of which the defendants were aware) and the plaintiff's amended statement of loss and damage. If, during the first half of February 2016, the defendants had been in any great doubt about the prospects of such an amendment being allowed, then they might have brought the matter to a head by insisting that the plaintiff seek leave forthwith, and not await the first day of the trial. The defendants did not do so. Also, as noted, the defendants anticipated that Ms Hague would give evidence.

[11] However, even if Ms Hague had not been an anticipated witness, there was expert opinion about the plaintiff's need for care and her unemployability, and ample evidence about the extent of care which she was in fact provided. If I had not received Ms Hague's report, which brought these matters together and gave her expert opinion, these matters would have been the subject of submissions. Although I accepted Ms Hague's evidence, I doubt whether the outcome of the case would have been substantially different had she not given evidence.

[12] Having not sought to have the plaintiff examined by another occupational therapist, and being on notice that Ms Hague was to be a witness at the trial, it was something of an indulgence to the defendants to allow them to have the plaintiff examined by an occupational therapist during the trial. This added to the length of the trial. I do not propose to revisit my reasons of 7 March 2016. To the extent that the defendants were prejudiced by the arrival in late November 2015 of Ms Hague's report, I accommodated this by allowing Mr Fraser to examine the plaintiff and to give evidence. The plaintiff was prejudiced by having to be examined by an occupational therapist and having to await Mr Fraser's report during the course of the trial. This is because the defendants could and should have raised the question of having the plaintiff examined by their own occupational therapist much sooner.

[13] In short, I am not persuaded that the defendants could not have reasonably considered the plaintiff's $1,445,000 offer during the period that the offer remained open for acceptance.

[14] The defendants also note how matters developed over the few years prior to trial. I have recorded these things in my primary reasons. The evolution of the plaintiff's claim, including evidence about her increased need for care, is summarised in the parties' chronologies. However, these matters are not of crucial importance in deciding whether the defendants have shown that an order for costs other than that stated in r 360(1) is appropriate.

[15] In a case such as this, the Court must (where relevant) have regard to the mandatory final offers in making a decision about costs.[2] I note that the mandatory offers made on 3 October 2013 were reflective of the facts known to the parties at that time. After that time the plaintiff's psychiatric condition deteriorated, with implications for her claims for economic loss and for her need for care. Her decline and her increasing need for care were the subject of lay and other evidence which was disclosed to the defendants well prior to the making of the plaintiff's formal offer on 5 February 2016. The October 2013 mandatory offers do not have significant implications for the appropriate order for costs. The plaintiff's October 2013 offer is not submitted by the defendants to have been unreasonable. The difference between the defendants' mandatory offer of 3 October 2013 and their 3 February 2016 offer of $1,000,000 together with administration fees and charges and costs reflects the defendants' appreciation of the fact that by February 2016 the plaintiff's circumstances and the quantum of her claim had changed. The defendants were in a reasonably informed position to make an offer in early February 2016, just as they were in a position to give reasonable consideration to the plaintiff's $1,445,000 offer.

[16] This case is unlike one in which a plaintiff relies upon a formal offer which was made well before some significant change in the case. In some cases, a party succeeds on the

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[2] *Motor Accident Insurance Act* 1994 (Qld), s 51C(10); and see *Bulsey v State of Queensland* [2016] QCA 158 at [32] – [42].

basis of an expert report or other evidence which was not available and disclosed at the time that party's offer was made. A defendant's rejection of the plaintiff's offer may have been reasonable in those circumstances. As has been said in other cases, an offer to settle must be evaluated in the light of the circumstances as they exist at the time the offer is made.[3] A judge may be entitled to depart from the order for costs stated in r 360(1) on the basis that the nature of the plaintiff's case was not clearly made out at the time the offer was made. I do not consider that this is such a case.

[17] Let it be assumed, however, for the purpose of argument, that the defendants somehow apprehended in the first half of February 2016 that the plaintiff's claim was not being made on the basis of an ongoing need for care in an amount of 28 hours per week, or reasonably considered that an assessment would be made by the Court on the basis of a smaller claim than the amount claimed in the plaintiff's updated statement of loss and damage. The plaintiff's submissions on costs include calculations undertaken to reflect reductions in her claim and a reduced award, particularly in respect of future care. Making further appropriate adjustments for very recent currency variations, the adjusted amount is still substantially more than the amount offered by the plaintiff in her 5 February 2016 offer. This is another basis upon which to distinguish cases in which the amount eventually awarded is very close to the amount offered.[4]

[18] Finally, the defendants seek to rely upon offers which they made mid-trial and the plaintiff's response to them as somehow proving that the evidence in the case was uncertain. But any uncertainty was due to the late appearance of Mr Fraser as a witness for the defendants. In any event, I do not consider that these mid-trial communications provide a reason as to why an order for costs on the standard basis is appropriate in the circumstances. During the course of the trial, the defendants offered to settle in the sum of $1,200,000 plus administration fees and charges plus costs. The plaintiff's solicitors advised they were not in a position to respond because at the time not all of the evidence had been put before the Court and the matter would require sanctioning. Mr Fraser's report was not to hand. On 9 March 2016, the defendants offered the sum of $1,445,001 plus reasonable administration fees and charges plus costs, and that offer was left open until 5.00 pm on 10 March 2015. Again, the plaintiff was disinclined to respond to that offer because Mr Fraser had yet to give his evidence. In response, the defendants' solicitors indicated that they would give the plaintiff time to consider the matter and that they were prepared to re-open the offer until 10.00 am on Friday, 11 March 2016. By then, all of the evidence was in and the cases had closed. Acceptance of that offer at that late stage would not have saved any costs.

[19] The plaintiff was entitled, based upon the advice she and her family received, to make an assessment of whether acceptance of that offer was in her best interests or whether, instead, she should hope for a more favourable judgment based upon the submissions that were made to me on 11 March 2016. The course adopted by the plaintiff of not requesting the defendants to re-open their offer in order to accept that offer, subject to the sanction of the Court, was reasonable.

[20] Although the defendants' conduct in making offers during the course of the trial showed an appropriate preparedness to resolve the matter at a late stage and avoid uncertainty for

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[3] See in this regard *GEJ & MA Geldard Pty Ltd v Mobbs & Ors (No 3)* [2011] QSC 297 at [48] – [55]; see also *Ross v Suncorp Metway Insurance Ltd* [2002] QCA 93 at [27] – [30].

[4] See e.g. *Ross v Suncorp Metway Insurance Ltd* [2002] QCA 93 at [29(c)].

both themselves and the plaintiff, the making of those offers does not make it appropriate to order that the plaintiff's costs of the proceeding be on the standard basis. Instead, it indicates that the defendants made an informed assessment about the matter and hoped that the plaintiff would resolve the matter on the basis of their offer. Similarly, the defendants made an informed offer on 3 February 2016. The defendants' offers were too low to engage the cost protection provisions of the rules in relation to formal offers. Their *Calderbank* offer of 8 March 2016 was less favourable to the plaintiff than the judgment she obtained. Their offers do not incline me to depart from the order for costs provided for in r 360.

[21] In all the circumstances, I do not consider that it is appropriate to make a different order for costs than the one stated in r 360. The plaintiff's reasonable offer of 5 February 2016 was not accepted. As a result, she was put to substantial expense in running a substantial trial and having to travel to Australia to give evidence. The task and costs of preparing for trial were not made any lighter by the failure of the defendants to make appropriate admissions until very close to the trial. In all the circumstances, the most appropriate order is one which indemnifies the plaintiff in respect of her costs. For these reasons, I ordered on 29 July 2016 that the second defendant pay the plaintiff her costs of and incidental to the proceeding to be assessed on the indemnity basis.